(19,075)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE ST. JOE MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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a In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah.

C. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.

Appeal from the district court of the third judicial district in and for the county of Salt Lake, State of Utah, before the Honorable William C. Hall, judge.

Appearances.

For the plaintiff. N. W. Sonnedecker, and C. C. Dey.
For the defendant. Albert W. Casey, Pierce, Critchlow and Barrette Brown and Henderson.

1 In the District Court of the Third Judicial District of Utah in and for the County of Salt Lake.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } Complaint.

The plaintiff above named complains of the said defendants and alleges and shows to the court, that the plaintiff did on the 23rd day of August, A. D. 1880, declare his intention to become a citizen of the United States in the fourth district court of Colorado, sitting at Leadville, Lake county of said State.

That prior to the second day of January, 1898, the plaintiff was, ever since has been and now is, the owner (subject only to the paramount title of the United States) and in the possession and entitled to the possession of that dertain mine and mining claim, containing a lode of rock in place bearing silver and other precious metals, situated in West Mountain mining district, Salt Lake county and State of Utah, called the "Yes You Do" mining claim; and more particularly described as follows:

Commencing from post No. 1, a corner of the claim, thence N. 60 deg. 11′ E. 1034, 3 feet to corner No. 2; thence N. 39 deg. 03′ E. 384 8/10 feet to corner No. 3; thence S. 35 deg. 30′ E. 600 feet to corner No. 4; thence S. 54 deg. 30′ W. 1400 feet to corner No. 5; thence N. 35 deg. 30′ W. 600 feet, to corner No. 1, the place of beginning of surface bounds.

The presumed course of the lode of said claim from the discovery point thereof bears N. 36 deg. 59′ E. 356.1 feet to a point on the north-easterly end line and S. 60 deg. 16′ W. 1065.8 feet to a point on the south-westerly end line.

2 Said claim containing a total area of 15.989 acres.

That the defendants claiming to be the owners of alleged adjacent mining claims called the Uhlig No. 1 and Uhlig No. 2, on or about the 1st day of July A. D. 1898, wrongfully caused said alleged Uhlig No. 1 and Uhlig No. 2, mining claims to be so surveyed as to cross upon and overlap the "Yes You Do" mining claim and lode, and include a portion thereof as follows:

Conflict with Uhlig No. 1 Lode claim survey No. 3683. Commencing at corner No. 5 of the "Yes You Do" Lode claim; thence along the southwesterly end line of this claim N. 35 deg. 30′ W. 376 1/10 feet to point of intersection with the westerly end line of the "Uhlig No. 1 Lode claim; thence along this end line N. 20 deg. 12′ W. 54 3/10 feet to corner No. 4 of the "Uhlig No. 1" Lode claim; thence along the northerly side line of this claim S. 72 deg. 46′ E. 1145 3/10 feet to corner No. 1 of this claim; thence along the easterly end line of this claim S. 20 deg. 12′ E. 72 1/10 feet to point of intersection with the southeasterly side line of the "Yes You Do" Lode claim; thence along this side line S. 54 deg. 30′ W. 1083 feet to corner No. 5 of this claim, the place of beginning of surface bounds. Containing 6.374 acres.

Conflict with "Uhlig No. 2 Lode claim survey No. 3684. Commencing at corner No. 4 of the "Yes You Do" Lode claim; thence along the southeasterly side line of said claim S. 54 deg. 30′ W. 317 feet to point of intersection with the westerly end line of the Uhlig No. 2 Lode claim; thence along this end line N. 20 deg. 12′ W. 217 6/10 feet to corner No. 4 of last said claim; thence along its northerly side line N. 50 deg. 38′ E. 260 2/10 feet to point of intersection with the northeasterly end line of the "Yes You Do" Lode claim; thence S. 35 deg. 30′ E. 227 4/10 feet to corner No. 4 of this claim, the place of beginning of surface bounds. Containing 1.441 acres.

3 That on or about the 24th day of August 1898, the defendants filed the field notes and diagram of said survey of the alleged Uhlig No. 1, and Uhlig No. 2 mining claims, and also an application for a United States patent for said mining claims, in the United States land office, at Salt Lake City, State of Utah, and caused the register of said land office to give notice of said application for a patent, by publication, as required by law. That in and by said application for patent the defendants wrongfully set up and alleged that Edmund H. Uhlig and Alex McKernan were the owners and in the possession of the whole of the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, inclusive of the premises last above described and the lode therein, part of the "Yes You Do" mining claims and lode, and the property, and in possession of the plaintiff.

That the plaintiff during the sixty days period of publication of the notice of application for patent for said alleged Uhlig No. 1 and Uhlig No. 2 mining claims, filed in said land office, under oath, a protest and adverse claim to said application, and for said last described premises and the lode therein, in due form and showing the

nature, extent and boundaries of the adverse claim of the plaintiff, and thereupon proceedings on said application, in said land office were and are stayed to await the determination, by a court of competent jurisdiction, of the right of possession to said last described premises, and the rights of the respective parties therein and thereto, and to that end the plaintiff brings this suit, the period of thirty days not having elapsed since the filing of said protest and adverse claim.

That the defendants maintain and prosecute said application for patent for the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, and thereby the title and possession of plaintiff in and to the
4 last above described premises, being the area thus brought in conflict between the "Yes You Do" mining claim and the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, are wrongfully impeached, clouded and encumbered, and the value of plaintiff's estate and property therein greatly depreciated to his great damage.

The plaintiff therefore prays judgment and relief against the defendants Edmund H. Uhlig and Alex McKernan.

That the plaintiff is the owner and lawfully in, and entitled to the possession of the last above described premises, the area in conflict between the "Yes You Do" mining claim, and the alleged Uhlig No. 1 and Uhlig No. 2 mining claim, and the lode therein, and quieting and confirming plaintiff's title thereto and possession thereof.

That the defendants have no title to or right of possession of said conflict area or the lode therein, or any part thereof.

That the defendant- be restrained, pending the action, and upon trial perpetually, from entering in or on said conflict area or the lode therein, or any part thereof, or mining in or extracting any ores or minerals therefrom, and from in any — interfering with the possession thereof; also that the plaintiff have all other and further relief proper, with costs of suit.

N. W. SONNEDECKER,
Attorney for Plaintiff.

5 STATE OF UTAH, }
County of Salt Lake, } *ss:*

G. Lavignino being duly sworn says he is the plaintiff in this action, and knows the contents of the foregoing complaint; that said complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it true.

G. LAVAGNINO.

Subscribed and sworn to before me this 14th day of November, 1898.

[SEAL.] WILLIAM J. BARRETTE,
Notary Public.

My commission expires November 16th, 1900.

6 In the District Court of the Third Judicial District, State of Utah, County of Salt Lake.

G. LAVIGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } Demurrer.

Now comes the defendant Edmund H. Uhlig, and demurs to the complaint of the plaintiff herein upon the following grounds:

1st. That the said complaint does not state facts sufficient to constitute a cause of action.

2nd. That the said complaint is ambiguous, undertain and unintelligible in this: That no definite or sufficient description of the mining claim alleged to be owned by the plaintiff and called the "Yes You Do" mining claim is given in said complaint, and that from the description, as contained in said complaint, of the said alleged claim, it is impossible to determine where the same is located, and that the various descriptions of the property claimed to be owned by the plaintiff, and of the property claimed to be in conflict with defendants' claim are inconsistent with each other and are so confusing and uncertain that it is impossible for the defendant to intelligently answer the same.

CHARLES W. MORSE AND
ALBERT W. CASEY,
Attorneys for the Defendant Edmund H. Uhlig.

Received a copy of the above demurrer this 24th day of February, 1899.

N. W. SONNEDECKER.

7 In the District Court of the Third Judicial District, County of Salt Lake, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } Motion.

The defendant Alex McKernan, appearing specially for the purposes of this motion only, moves the court to quash the summons heretofore served upon him in this action and to dismiss this action upon the following grounds:

1. That the summons served upon him was not in the form nor substantially in the form required by section 2939 of the Revised Statutes of Utah.

2. That no summons was issued within three months from the date of filing the complaint in this action in the office of the clerk of this court.

3. That no summons and proof of service thereof was filed in the office of the clerk of this court within ten days after service of the same as required by section 2946 of the Revised Statutes of Utah.

C. W. MORSE AND
ALBERT W. CASEY,
Attorneys for Defendant Alex McKernan.

We do hereby certify that we are counsel for defendant Alex McKernan in the above entitled action, and in our opinion the objections set forth in the foregoing motion are well taken.

C. W. MORSE AND
ALBERT W. CASEY,
Attorneys for Defendant Alex McKernan.

Due and personal service of the foregoing is hereby admitted this fourth day of August, 1899.

N. W. SONNEDECKER,
Attorney for Plaintiff.

8 SHERIFF'S OFFICE.

STATE OF UTAH,
County of Salt Lake, } ss:

I, John F. Howells, sheriff of Salt Lake county, State of Utah, do hereby certify that I received the within and hereto annexed summons on the 15th day of July, 1899, and that I have served said summons on Alex McKernan by delivering to and leaving with him personally a true copy of said summons on the 15th day of July, 1899, at the city and county of Salt Lake and State of Utah, and at the time of the service of said summons so served on Alex McKernan I endorsed on the copy so served the date and place of service and added my official title thereto.

JOHN F. HOWELLS,
Sheriff Salt Lake County, Utah,
By A. G. DYER, *Deputy.*

Dated July 17, 1899.

Fees	1.00
Mile	.20
	1.20

9 In the District Court of the Third Judicial District of the State of Utah, County of Salt Lake.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } Summons.

The State of Utah to said defendant-:

You are hereby summoned to appear within twenty days after the service of this summons upon you, if served within the county in which this action is brought, otherwise, within thirty days after service, and defend the above entitled action; and in case of your failure to do so, judgment will be rendered against you according to the demand of the complaint which within ten days after service of this summons upon you will be filed with the clerk of said court.

N. W. SONNEDECKER,
Plaintiff's Attorney.

P. O. address 614 & 615 Progress block, Main street, Salt Lake City, Utah.

Marked: Filed Aug. 9, 1899. David C. Dunbar, clerk, dist. court of Salt Lake county, by F. J. Rawlings deputy. Received at sheriff's office July 7, 1899, John F. Howells sheriff, Salt Lake county, Utah.

10 In the District Court for the Third Judicial District, County of Salt Lake, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants.

To the plaintiff and N. W. Sonnedecker, his attorney:

Please take notice that on Saturday the seventh day of October A. D. 1899, at 9:30 o'clock a. m., at the court room of said court, before the Honorable Ogden Hiles, judge, at the city and county building, Salt Lake City in said county, the defendant Alex McKernan will call up the motion of said defendant to quash the summons served upon him in this action and to dismiss the action, and ask to have said motion granted. Said motion will be made on the records and files in said action.

ALBERT W. CASEY AND
MOORE & WHITTEMORE,
Attorneys for Defendant Alex McKernan.

Due and personal service of the foregoing is hereby admitted this 28th day of September, A. D. 1899.

N. W. SONNEDECKER,
Attorney for Plaintiff.

11 In the Third District Court of Utah, Salt Lake County.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } Affidavit.

STATE OF UTAH,
County of Salt Lake, } ss:

N. W. Sonnedecker, being first duly sworn deposes and says that he is attorney for plaintiff herein, that he filed the complaint herein on the 16th day of November, 1898, describing the "Yes You Do" Lode mining claim in West Mountain mining district, Salt Lake county, Utah, as an adverse of the Uhlig No. 1 and Uhlig No. 2 Lode mining claims claimed by defendants herein; that this affiant made repeated efforts to reach the defendants and was informed and believes that they were at work in the mines in the mountains inaccessible on account of deep snow; that on the 4th day of February 1899, within three months after the filing of the complaint a summons was issued as shown by the records of the sheriff's office of Salt Lake county to these defendants and that a copy of said summons with a copy of the complaint herein was served on the defendant Edmund H. Uhlig, February 7, 1899, and being unable to find the defendant Alex McKernan, said summons was returned
12 March 29, 1899; that an alias was issued as shown by the files herein and served on the defendant Alex McKernan July 15, 1899.

N. W. SONNEDECKER.

Subscribed and sworn to before me this 16th day of October, 1899.

ALVIN V. TAYLOR,
[SEAL.] *Notary Public.*

13 In the District Court of the Third Judicial District in and for the County of Salt Lake, Utah.

G. LAVAGNINO
vs.
EDMUND H. UHLIG ET AL. } No. 2285.

The motion to quash the summons heretofore issued and to dismiss the plaintiff's complaint herein, having been heretofore fully argued and submitted, and the court having duly considered the

same, and being fully advised in the premises, it is now ordered that said summons heretofore issued, in so far as it may respect the defendant Alexander McKernan, be, and the same is hereby quashed.

And it is further — that the plaintiff's complaint, in so far as it may respect the defendant Alexander McKernan, be, and the same is hereby dismissed.

And it is further ordered that the demurrer to the plaintiff's complaint in so far as it may relate to the defendant Uhlig be, and the same is hereby overruled.

Dated November 22nd, 1899.

14 In the District Court of the Third Judicial District in and for the County of Salt Lake, Utah.

G. LAVAGNINO
v.
EDMUND H. UHLIG ET AL. } No. 2285.

G. LAVAGNINO
v.
JAMES M. GAREY ET AL. } No. 2451.

Upon motion of Mr. Albert W. Casey, attorney for the defendants in each of the within causes, and good cause being shown, it is ordered that the order heretofore made in each of the within causes on November 22, 1899, overruling the demurrers herein be, and the same is hereby set aside and held for naught in so far as it may relate to the ruling upon the said demurrers and to them only.

Dated November 25, 1899.

15 In the Third District Court of Utah in and for Salt Lake County.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } Amended Complaint.

The plaintiff above named confessing the demurrer of the defendants heretofore filed herein, files this his amended complaint.

Plaintiff alleges:

I.

That on the 23rd day of August, 1880 he declared his intention to become a citizen of the United States in the fourth district court of Colorado sitting at Leadville, Lake county of said State.

II.

That on or about the 1st day of January, 1898, the plaintiff's grantor was and ever since, until about the 1st day of November, 1898, has been and the plaintiff ever since has been and now is the owner in the possession and entitled to the possession (subject to the paramount title of the United States) of that certain lode mining claim containing a lode of rock in place bearing silver and other precious metals situated in West Mountain mining district, Salt Lake county, Utah, called the "Yes You Do," and plaintiff alleges that he and his grantor have during all of said time complied with the requirements of the laws, rules and regulations of the United States, the State of Utah and the West Mountain mining district to entitle him to said lode claim.

16 The description of said claim is as follows: Beginning at corner post No. 1 of said claim running thence north 60 deg. 11 min. east 1034.3 feet to corner No. 2; thence north 39 deg. 3 min. east 384.8 feet to corner No. 3; thence south 35 deg. 30 min. east 600 feet to corner No. 4; thence south 54 deg. 30 min. west 1400 feet to corner No. 5; thence north 35 deg. 30 min. west 600 feet to corner No. 1 the place of beginning. The presumed course of the lode of said claim from the discovery point thereof bears north 36 deg. 69 min. east 356.1 feet to the northerly end line and south 60 deg. 16 min. west 1065.8 feet to the southerly end line.

III.

That the defendants claiming to be the owners of alleged adjacent mining claims called the Uhlig No. 1 and Uhlig No. 2 Lode mining claims, on or about the first day of July, A. D. 1898, wrongfully caused said alleged Uhlig No. 1 and Uhlig No. 2 mining claims to be so surveyed as to cross upon and overlap the "Yes You Do" Lode mining claim, and include portions thereof as follows: The conflict area with the said Uhlig No. 2 Lode mining claim is described as follows: Beginning at a point on the northerly side line of said Uhlig No. 2 Lode mining claim 1177.6 feet distant from corner No. 1 of said claim south 50 deg. 38 min. west from said corner No. 1 running thence south 35 deg. 30 min. east 227.4 feet; thence south 54 deg. 30 min. west 317 feet; thence north 20 deg. 12 min. west 217.6 feet to corner No. 4 of said Uhlig No. 2; thence north 50 deg. 38 min. east 260.2 feet to the place of beginning. An area of 1.441 acres.

The conflict in area with the said Uhlig No. 1 Lode mining claim is described as follows: Beginning at a point on the westerly end line of the Uhlig No. 2 Lode claim 217.6 feet from corner No. 4 of said Uhlig 2, running thence south 54 deg. 30 min. west 1083 feet; thence north 35 deg. 30 min. west 376.1 feet, thence north 20 deg. 12 min. west 54.3 feet; thence south 72 deg. 46 min. east 1145.3 feet,

thence south 20 deg. 12 min. east 72.1 feet to the place of beginning. An area of 6.374 acres.

17 The northwest corner of section 32 tp. 3 south range 2 west bears north 69 deg. 59 min. east 8823.9 feet distant from corner No. 1 of said Uhlig No. 2 mining claim.

That in or about the 24th day of August, 1898, the defendants filed the field notes and a diagram of said surveys of the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, and also made an application for a United States patent for said mining claims, in the United States land office, at Salt Lake City, State of Utah, and caused the register of said land office to give notice of said application for a patent, by publication, as required by law. That in and by said application for patent the defendants wrongfully set up and alleged that Edmund H. Uhlig and Alex McKernan were the owners and in the possession of the whole of the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, inclusive of the premises last above described and the lode therein, part of the "Yes You Do" mining claim and lode, and the property, and in possession of the plaintiff.

That the plaintiff during the sixty days' period of the publication of the notice of application for patent for said Uhlig No. 1 and Uhlig No. 2 mining claims, filed in the said land office, under oath, a protest and adverse claim to said application, and for said last described premises and the lode therein, in due form and showing the nature, extent and boundaries of the adverse claim of the plaintiff, and thereupon proceedings on said application, in said land office were and are stayed to await the determination by a court of competent jurisdiction, of the right of possession to said last described premises, and the rights of the respective parties therein and thereto, and to that end the plaintiff brings this suit, the period of thirty days not having elapsed since the filing of said protest and adverse claim.

18 That the defendants maintain and prosecute said application for patent for the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, and thereby the title and possession of plaintiff in and to the last above described premises, being the area thus brought in conflict between the "Yes You Do" mining claim and the alleged Uhlig No. 1 and the Uhlig No. 2 mining claims are wrongfully impeached, clouded and encumbered, and the value of the plaintiff's estate and property therein greatly depreciated, to his great damage.

The plaintiff therefore prays judgment and relief against the defendants Edmund H. Uhlig and Alex McKernan.

That the plaintiff is the owner and lawfully in and entitled to the possession of the last above described premises, the area in conflict between the "Yes You Do" mining claim and the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, and the lode therein; and quieting and confirming plaintiff's title thereto and possession thereof.

That the defendants have no title to or right of possession of said conflict area or the lode therein, or any part thereof.

That the defendants be restrained, pending the action, and upon trial perpetually, from entering in or on said conflict area or the lode therein, or any part thereof, or mining in or extracting any ores or minerals therefrom, and from in any way interfering with the possession thereof. Also that the plaintiff have all other further proper relief, with costs of suit.

N. W. SONNEDECKER,
Attorney for Plaintiff.

19 STATE OF UTAH, } ss:
County of Salt Lake, }

G. Lavagnino being duly sworn says he is the plaintiff in this action and knows the contents of the foregoing complaint; that said complaint is true of his own knowledge; except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

G. LAVAGNINO.

Subscribed and sworn to before me this 15th day of January, 1900.

[SEAL.] THOS. C. ARMSTRONG,
Notary Public.

My commission expires April 15, 1901.

20 In the District Court of the Third Judicial District, County of Salt Lake, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } Demurrer to Amended Complaint.

Comes now the defendant Edmund H. Uhlig and demurs to the amended complaint of the plaintiff herein upon the following grounds:

1. That said amended complaint does not state facts sufficient to constitute a cause of action.

2. That the said amended complaint is ambiguous, uncertain and unintelligible in this: That no definite or sufficient description of the mining claim alleged to be owned by plaintiff and called the "Yes You Do" mining claim is given in said amended complaint, and that from the description of said alleged claim as contained in said amended complaint, it is impossible to determine where the same is located, and that the various descriptions of the property claimed to be owned by the plaintiff, and of the property claimed to be in conflict with the defendant's claim are inconsistent with

each other and are so confusing and uncertain that it is impossible for the defendant to intelligently answer the same.

Dated January 22, 1900.

C. W. MORSE AND
ALBERT W. CASEY,
Attorneys for the Defendant Edmund H. Uhlig.

Due and personal service of the above demurrer, together with receipt of a copy of the same is hereby admitted this twenty-fourth day of January A. D. 1900.

N. W. SONNEDECKER,
Attorney for Plaintiff.

21 In the District Court of the Third Judicial District in and for the County of Salt Lake, Utah.

G. LAVAGNINO
v.
EDMUND H. UHLIG ET AL. } No. 2285.

Comes now the plaintiff herein by his attorney N. W. Sonnedecker, and confesses the demurrer heretofore filed by the defendants to the plaintiff's complaint, and is by the court granted fifteen days' time in which to amend his complaint or to file an amended complaint herein.

Dated July 7, 1900.

22 In the Third Judicial District Court in and for the County of Salt Lake, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } No. 2285. Complaint.

Now comes the plaintiff, leave of court having been had, and files this, his second amended complaint, alleging:

1. That on the 23rd day of August, 1880, he declared his intention of becoming a citizen of the United States, in the fourth district court of Colorado, sitting at Leadville, Lake county, in said State, and that J. Fewson Smith, Jr., is a natural born citizen of the United States.

2. That on or about the 1st day of January, 1898, the above named J. Fewson Smith, Jr., entered upon the unoccupied and unclaimed mineral lands of the United States, situated in the West Mountain mining district, Salt Lake county, Utah, and discovered a lode of rock in place, containing gold and silver and other pre-

cious metals, and there and then erected a monument, and posted a notice thereon, naming the said lode the "Yes You Do" Lode mining claim, giving the data of the location and the length of the lode or vein, adding his name thereto as locator, describing the location of the said discovery by reference to natural objects and permanent monuments sufficient to identify the said claim, and then and there, on said day, distinctly marked the boundaries of said claim on the ground so that they could be readily traced, and thereafter a copy of said notice was recorded in Book "E," on page 145, of the said
23 records of Salt Lake county, Utah, and thereafter, to-wit, on the 5th day of September, 1898, by quit claim deed, regularly executed and delivered, conveyed to the plaintiff herein, G. Lavagnino, the above described property of the "Yes You Do" Lode mining claim. That this plaintiff and his grantor have, during all the times herein mentioned, complied with all the laws, rules and regulations of the United States, of the State of Utah and of the West Mountain mining district, to entitle them to the possession of the said lode mining claim.

A description of the "Yes You Do" mining claim is as follows, to-wit:

Commencing at corner No. 1 of said "Yes You Do" Lode mining claim, from which the northwest corner of section 32, township 3, S. R. 2 W., S. L. B. M., bears north 62 degrees 31 minutes, east, 11411.6 feet distant; running thence north 60 degrees 11 minutes, east 1034.3 feet to corner No. 2; thence north 39 degrees 3 minutes, east 384.8 feet to corner No. 3; thence south 35 degrees 30 minutes, east 600 feet to corner No. 4; thence south 54 degrees 30 minutes, west 1,400 feet to corner No. 5; thence north 35 degrees 30 minutes, west 600 feet to corner No. 1, the place of beginning.

3. That the defendants, claiming to be the owners of alleged adjacent mining claims, called the "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims, on or about the 1st day of July, 1898, wrongfully caused said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims to be so surveyed as to cross upon and overlap the "Yes You Do" Lode mining claim and include portions thereof, as follows: Conflict area with "Uhlig No. 2" lode:

Beginning at a point on the northerly side line of the said "Uhlig No. 2" Lode mining claim 1177.6 feet distant from corner No. 1 of said claim, south 50 degrees 38 minutes west from said corner No. 1, running thence south 35 degrees 30 minutes, east 227.4 feet; thence south 54 degrees 30 minutes, west 317 feet; thence north 20 degrees 12 minutes, west 217.6 feet, to corner No. 4 of said "Uhlig No. 2;" thence north 50 degrees 38 minutes, east 260.2 feet to the place of beginning, an area of 1.441 acres.

The conflict area with the said "Uhlig No. 1" Lode mining claim is described as follows:

Beginning at a point on the westerly end line of the "Uhlig No. 2" Lode claim, 217.6 feet from corner No. 4 of said "Uhlig No. 2," running thence south 54 degrees 30 minutes, west 1083 feet; thence

north 35 degrees 30 minutes, west 376.1 feet; thence north 20 degrees 12 minutes, west 54.3 feet; thence south 72 degrees 46 minutes, east 1145.3 feet; thence south 20 degrees 12 minutes, east 72.1 feet to the place of beginning.

24 & 25 The northwest corner of section 32, township 3 south, range 2 west, bears north 69 degrees 59 minutes, east 8823.9 feet distant from corner No. 1 of said "Uhlig No. 2" Lode mining claim.

That on or about the 24th day of August, 1898, the defendants filed the field notes and a diagram of said surveys of the alleged "Uhlig No. 1" and "Uhlig No. 2" mining claims; and also an application for a United States patent for said mining claims, in the United States land office at Salt Lake City, State of Utah, and caused the register of said land office to give notice of said application for patent by publication, as required by law. That in and by said application for patent the defendants wrongfully set up and alleged that Edmund H. Uhlig and Alex McKernan were the owners and in the possession of the whole of the said "Uhlig No. 1" and "Uhlig No. 2" mining claims, inclusive of the premises last above described, and the lode therein, part of the "Yes You Do" mining claim and lode, and the property and in possession of the plaintiff.

That the plaintiff, during the sixty days' period of the publication of the notice of application for patent for said "Uhlig No. 1" and "Uhlig No. 2" mining claims, filed in the said land office, under oath, a protest and adverse claim to said application, and for said last described premises and the lode therein, in due form, and showing the nature, extent and boundaries of the adverse claim of the plaintiff, and thereupon proceedings on said application in said land office were and are stayed to await the determination, by a court of competent jurisdiction, of the right of possession to the said last described premises, and the rights of the respective parties therein and thereto, and to that end the plaintiff brings this suit, the period of thirty days not having elapsed since the filing of said protest and adverse claim.

That the defendants maintain and prosecute said applications for patent for the alleged "Uhlig No. 1" and "Uhlig No. 2" mining claims, and thereby the title and possession of the plaintiff in and to the last described premises, being the area thus brought into conflict between the "Yes You Do" mining claim and the alleged "Uhlig No. 1" and "Uhlig No. 2" mining claims are wrongfully impeached, clouded, encumbered and the value of the plaintiff's estate and property therein greatly depreciated, to his great damage.

26 The plaintiff therefore prays judgment and relief against the defendants Edmund H. Uhlig and Alex McKernan.

That the plaintiff is the owner and lawfully in, and entitled to the possession of the last above described premises, the area in conflict between the "Yes You Do" mining claim and the "Uhlig No. 1" and "Uhlig No. 2" mining claims, and the lode therein; and quiet-

ing and confirming the plaintiff's title thereto and possession thereof.

That the defendants have no title to or right to possession of said conflict area or the lode therein, or any part thereof.

That the defendants be restrained, pending the action, and upon trial perpetually from entering in or on said conflict area or the lode therein, or any part thereof, or mining in or extracting any ores or minerals therefrom, and from in any way interfering with the possession thereof. Also that the plaintiff have all further and proper relief, with costs of suit.

N. W. SONNEDECKER,
Attorney for Plaintiffs.

STATE OF UTAH, } ss:
County of Salt Lake, }

N. W. Sonnedecker, being first duly sworn, says that he is attorney for the plaintiff herein; that he makes this affidavit because the plaintiff is absent from Salt Lake county, State of Utah, wherein this affiant resides; that he knows the contents of the foregoing complaint, and that said complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

N. W. SONNEDECKER.

Subscribed and sworn to before me this 21st day of July A. D. 1900.

[SEAL.]

H. G. TWOMEY,
Notary Public, Salt Lake County, Utah.

27 In the District Court of the Third Judicial District in and for the County of Salt Lake and State of Utah.

G. LAVIGNINO
v.
EDMUND H. UHLIG ET AL. } No. 2285.

G. LAVAGNINO
v.
JAMES M. GAREY ET AL. } No. 2451.

Upon motion of Mr. A. W. Casey, attorney for the defendants herein, in each of the within causes, and good cause being shown, it is now here ordered that said defendants herein, and each of them, have, and they are hereby granted to and including September 1st, 1900, in which to plead to the plaintiff's amended complaint heretofore filed herein.

Dated July 25th, A. D. 1900.

28 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Affidavit of Service by Attorney.

STATE OF UTAH,
County of Salt Lake, } ss:

Albert W. Casey being first duly sworn on his oath says that he is one of the attorneys for the defendant Edmund H. Uhlig, in the above entitled action; that he served upon the plaintiff above named the within and attached answer to plaintiff's second amended complaint in said action, by leaving a copy of the same in a conspicuous place in the office of N. W. Sonnedecker, one of the attorneys for the plaintiff herein, on the first day of September 1900 at thirty minutes past two o'clock in the afternoon of said day, there being no person in his office at that said time, and further affiant sayeth not.

ALBERT W. CASEY.

Dated September 1, 1900.

Subscribed and sworn to before me this 1st day of September 1900.

[SEAL.] H. G. TWOOMEY,
Notary Public in and for Salt Lake County, Utah.

29 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX. MCKERNAN, Defendants.
} Answer to 2nd Amended Complaint.

Comes now the defendant Edmund H. Uhlig, and for answer to plaintiff's second amended complaint, in the above entitled action, alleges:

1. Defendant denies each and every allegation in plaintiff's said complaint contained, not herein qualified or admitted.

2. Defendant denies that on the 1st day of January, 1898, or at any time prior or subsequent thereto, the plaintiff or his grantor was the owner or owners or entitled to the possession or in the possession of the alleged mining claim described in plaintiff's said complaint at the "Yes You Do" mining claim.

3. Defendant alleges that on or about the 1st day of January, 1889, this defendant, said Edmund H. Uhlig, entered upon then unclaimed and unoccupied mineral land of the United States in the West Mountain mining district in Salt Lake county, State of Utah, and then and there duly located two certain lode mining claims named and known as the "Uhlig No. 1" and the "Uhlig No. 2," which said last two mining claims are described, with magnetic variation at 16 degrees 28 minutes east, as follows:

Commencing at corner No. 1 of said "Uhlig No. 1" claim, and running north 20 degrees 12 minutes, west 145.5 feet to corner No. 4 of said "Uhlig No. 2" claim; thence north 50 degrees 38 minutes, east 1437.8 feet to corner No. 1 of said "Uhlig No. 2" claim; thence south 20 degrees 12 minutes, east 600 feet to corner No. 2 of said "Uhlig No. 2" claim; thence south 50 degrees 38 minutes, west 1437.8 feet to corner No. 3 of said "Uhlig No. 2" claim; thence south 20 degrees 12 minutes, east 145.5 feet to corner No. 2 of said "Uhlig" No. 1 claim; thence south 76 degrees 36 minutes, west 1151.9 feet to corner No. 3 of said "Uhlig No. 1" claim; thence north 20 degrees 12 minutes, west 522.9 feet to corner No. 4 of said "Uhlig No. 1" claim; thence north 72 degrees 46 minutes, east 1145.3 feet to corner No. 1 of said "Uhlig No. 1" claim, the place of beginning.

The northwest corner of section 32, township 3 south, range 2 west, bears as follows from corners No. 1 of said claims respectively: From No. 1 of said "Uhlig No. 1" claim north 60 degrees 28 minutes, east 10,255.6 feet; and from corner No. 1 of "Uhlig No. 2" claim, north 62 degrees 59 minutes, east 8823.9 feet.

That thereafter defendant Edmund H. Uhlig conveyed to Alex McKernan an undivided one-third interest in said two last named claims by deed dated October 19, 1896, and recorded in the office of the recorder of Salt Lake county, July 20th, 1897, in Book "O," on page 430. And this defendant denies that on or about the 1st day of July, A. D. 1898, or at any other time, either he or said Alex McKernan wrongfully or in any way caused a survey of the two last named claims to be made so as to cross upon or to overlap or in any manner to conflict with the plaintiff's alleged "Yes You Do" claim, or any other claim or property of plaintiff or his grantors; and this defendant alleges that ever since the location of the said two last named claims, he and Alex McKernan, subject only to the paramount title of the United States, during all the times of their respective record titles, have been the owners in the possession and entitled to the possession of the said "Uhlig No. 1" and the "Uhlig No. 2" Lode claims.

4. This defendant alleges that during all the time herein mentioned he was and now is a naturalized citizen of the United States; and said Alex McKernan, during his lifetime, was a native-born citizen of the United States.

5. This defendant alleges that the area in conflict as set forth in the plaintiff's said complaint is part of said two last named claims,

and plaintiff has no right, title, or interest in any manner to any part thereof.

6. This defendant alleges that on or about the 24th day of August, 1898, the field notes and diagram of survey for said "Uhlig No. 1" and "Uhlig No. 2" claims, and also an application for United States patent to the same were filed with the United States land office in Salt Lake City, Utah, and that due notice of said application was given as required by law; and this defendant alleges that he and his said co-owner have complied with the requirements of the laws of the United States and of the State of Utah, to entitle them to a patent to all of said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims (excepting only such fractions of conflicting claims as may be excluded in said application for patent), and that plaintiff has no right, title or interest in any manner in or to any part of said "Uhlig No. 1" and "Uhlig No. 2" claims.

31–33 7. This defendant further alleges that on the 22nd day of November, A. D. 1899, by an order of this court, duly made and entered, this action was dismissed as to the defendant Alex McKernan, and defendant further alleges that such dismissal operated as complete discontinuance of this action, and this defendant pleads such dismissal in bar of the further prosecution of the same.

Wherefore, this defendant demands judgment:

1. That plaintiff be decreed to have no right, title or interest in or to any part of the said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims.

2. That defendant and his said co-owner, or his legal representatives, be decreed to be the sole owners and solely entitled to the possession of all of the said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims, and entitled to a United States patent therefor.

3. For costs and disbursements of this action.

C. W. MORSE AND
ALBERT W. CASEY,
Attorneys for Defendant E. H. Uhlig.

STATE OF UTAH, }
County of Salt Lake, } ss:

Edmund H. Uhlig, being first duly sworn, on his oath says that he is one of the defendants named in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated therein upon information and belief, and as to those matters he believes them to be true.

EDMUND H. UHLIG.

Subscribed and sworn to before me this 1st day of September, A. D. 1900.

[SEAL.]

H. G. TWOMEY,
Notary Public in and for Salt Lake County, Utah.

Filed Sept. 1, 1900.

34 In the District Court of the State of Utah, Third Judicial District, Salt Lake County.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Notice of Motion for Continuance.

To G. Lavagnino, the plaintiff above named, and to N. W. Sonnedecker, his attorney:

Please take notice that on Saturday the twenty-sixth day of January, A. D. 1901, at the court room for the chancery division of said court in Salt Lake City, Utah, before the Hon. William C. Hall, judge of said court, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, the grantees of the defendant Edmund H. Uhlig above named will move for a continuance and postponement of the trial of said cause.

Said motion will be made on affidavits showing the materiality of evidence expected to be obtained, and that due diligence has been used to obtain it; showing the illness and consequent inability to attend of a material witness and officer of said defendant's grantee; showing the necessity of his attendance at the trial and the impossibility of such attendance at the time said trial is now set, and upon the records and files in the case.

ALBERT W. CASEY,
Attorney for the Grantees of Defendant Edmund H. Uhlig.

Received copy of the foregoing notice this 21st day of January A. D. 1901.

N. W. SONNEDECKER,
Attorney for Plaintiff.

35 In the District Court of the Third Judicial District in and for the County of Salt Lake.

G. LAVAGNINO
v.
EDMUND H. UHLIG ET AL.
} No. 2285.

Upon motion of Mr. Albert W. Casey, attorney for the defendant herein, and good cause being shown, it is after due consideration, ordered that the Saint Joe Mining Company, a corporation, be, and it is hereby substituted for the defendant Edmund H. Uhlig herein.

Dated January 25th, 1901.

36 In the District Court of the Third Judicial District, Salt Lake County, Utah, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG, ALEX MCKERNAN, and The Saint Joe Mining Company, a Corporation, Defendants.

No. 2285. Notice of Motion to Take Testimony and for Continuance.

To the plaintiff, G. Lavagnino, and to N. W. Sonnedecker, Esq., his attorney:

Please take notice that on Wednesday the thirteenth day of March at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, at the court room of said court, at Salt Lake City, in said county, before the Hon. W. C. Hall, The Saint Joe Mining Company, one of said defendants will move the court that a commission issue out of and under the seal of the court to take the testimony of Daniel Harrington, a witness residing out of the State, directed to some proper person residing in the county of Silver Bow and State of Montana, then and there to be selected and appointed by the judge of this court.

At the said time and place the said defendant will move the said court for a continuance of the trial of said cause on the ground of the absence of evidence.

Said motions will be made on the files and records in the case and upon the affidavit hereto attached.

Dated March 11, 1901.

ALBERT W. CASEY,
Attorney for said Defendant, Saint Joe Mining Company.

Good cause being shown therefor, it is ordered that the time of giving the foregoing notice is hereby shortened to two days.

Dated March 11, 1901.

WM. C. HALL, *Judge.*

37 In the District Court for the Third Judicial District, County of Salt Lake, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN and The St. Joe Min. Co., a Corporation, Defendants.

Affidavit on Motion to Take Testimony.

STATE OF UTAH,
County of Salt Lake, } *ss:*

R. A. Hasbrouck being first duly sworn on his oath says that he is the president of The Saint Joe Mining Company, one of the parties

defendant in the above entitled action; that the time for the trial of the same is set for the present term of this court in the chancery division thereof; that Daniel Harrinington is a material and necessary witness for said defendant on the trial of said action, without the benefit of whose testimony the said defendant cannot safely proceed to trial; that said witness resides in Silver Bow county, in or near the city of Butte, in the State of Montana, and is out of this State and will continue absent during the present term of this court.

That the reason that this application has not been made before is that the whereabouts and residence of said witness was not known to this affiant until the fourth day of the present month, when affiant was informed that the said witness resided about eight miles from a post office known as South Butte in the State of Montana, whereupon affiant immediately wrote a letter to said witness, enclosed the same in an envelope with the required postage
38 stamp thereon and mailed the same duly addressed to this witness, by depositing it in a United States letter box, to ascertain and confirm the truth of said information as to said witness' said residence; that no reply was received therefrom until the eighth day of March, 1901, and that affiant immediately, to-wit: on the ninth day of March, 1901, informed counsel for said company.

Affiant further says that he has read the statement of the evidence expected to be obtained from said Daniel Harrington as shown in the affidavit of Albert W. Casey hereto attached, and the same is substantially identical with the statements heretofore made to affiant by said witness.

Dated March 11, 1901.

R. A. HASBROUCK.

Subscribed and sworn to before me this 11th day of March, 1901.

CHAS. D. SAVERY,

[SEAL.] *Notary Public in and for said Salt Lake County.*

My commission expires Dec. 9, 1904.

39 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff, v. EDMUND H. UHLIG, ALEX MCKERNAN, and The St. Joe Min. Co., a Corporation, Defendants.	Affidavit on Motion for Continuance.

STATE OF UTAH, *County of Salt Lake,* } ss:

Albert W. Casey being first duly sworn on his oath says that he is one of the attorneys for The Saint Joe Mining Company, one of the

defendants in the above entitled action; that one of the witnesses for the said defendant is one Daniel Harrington, by occupation a miner and formerly and since the commencement of this action a resident of said Salt Lake county; that affiant has made due inquiry and is informed and believes that said witness is now absent from said county and said State, and has been since the present term of this court; that said defendant The Saint Joe Mining Company, by its president, R. A. Hasbrouck, has informed affiant that said company has used due diligence since the setting of this action for trial to learn the present post office address and whereabouts of said witness and this affiant has also similarly inquired but have this far been unable to learn the whereabouts or abode of said witness or his postoffice address except as stated in the affidavit of said R. A. Hasbrouck hereto attached; and affiant is informed and has reason to believe that at or before the beginning of the next term of this court the testimony of said witness by deposition can be duly taken or his personal attendance as a witness in said cause be procured in behalf of said defendants.

Affiant further says that the said Daniel Harrington is an important and material witness for the defendants in said cause and his testimony is necessary and material to the defense represented by affiant and without said testimony the said defendants cannot safely proceed with the trial of said action, and if the personal attendance of said witness cannot be obtained, it is the purpose of this affiant in behalf of said defendants to proceed in due form and with due diligence to procure his deposition.

Affiant further states that the evidence expected to be obtained from said Daniel Harrington as such witness is in substance, as follows:

That he, said witness, knew and was well acquainted with Edmund H. Uhlig, the person who located in his own name or in behalf of the locator of record, the lode mining claim known as Uhlig No. 1, Uhlig No. 2 and Mute No. 1 claims in West Mountain mining district in said county, a part of which said claims are included in the controversy in this action; that said Uhlig personally, as well as in connection with his co-owners, was living upon the ground and working upon said three claims prior to and from time to time and up to the time of their location as now appears of record, and that he worked upon and improved the said ground as an owner and having a right, title and interest in the same continuously prior to, at and subsequent to the time of their location down to the time of the acquirement by said company of and interest in and to the said claims; that the said Daniel Harrington was familiar with all of said ground and was frequently upon it and knows that the said Edmund H. Uhlig went upon the ground of the said Uhlig No. 1 and Uhlig No. 2 claims on December 31st, 1888, to relocate said claims for himself and in behalf of his co-owners and partners in interest and that said witness was on said ground soon after the 1st day of January 1889 and saw the stakes which defined the bound-

aries of said Uhlig No. 1 and Uhlig No. 2 claims and the discovery monuments and notices of location thereon; that the annual
41 assessment work on all of said three claims was kept up continuously and according to law from the time of their location down to the time of the acquiring of the interest of the said company one of the parties defendant and interested in this action, and witness knew of said assessment being done upon said claims and for their benefit and also of said assessment work for said claims being done in the Uhlig tunnel.

That said witness was employed at the time, prior and subsequent to the said location of said claims as foreman of work upon the ground distant about two thousand feet, known as the Yosemite ground and in sight of the ground in controversy in this action; that during a part of said period of said Daniel Harrington's said employment, and at the time of making said locations, the said Edmund H. Uhlig was employed by said witness at the said Yosemite ground, and the said Daniel Harrington knew of the whereabouts and actions of said Edmund H. Uhlig and of his making the said three locations; that the said Daniel Harrington is long experienced in and familiar with mining ground and with the proceeding- required by the laws of the United States and of the State of Utah and with the customs of miners in relation to properly locating lode mining claims, and knows that the said Uhlig No. 1, Uhlig No. 2 and Mute No. 1 claims were properly and duly located as aforesaid on U. S. Government land, not then claimed or occupied by any other persons and that the said three claims were duly represented down to the time of their conveyance to the said company defendant herein, according to the laws of the United States and of the State of Utah and of the regulations thereunder.

ALBERT W. CASEY.

Subscribed and sworn to before me this 11th day of March, 1901.

[SEAL.] CHAS. D. SAVERY,
Notary Public.

My commission expires Dec. 9, 1904.

42 In the District Court of the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG, ALEX MCKERNAN, and The Saint Joe Mining Company, a Corporation, Defendants.

Interrogatories Proposed to Daniel Harrington, a Witness on Behalf of the Defendant, The Saint Joe Mining Company.

Interrogatories Proposed on Direct Examination by Attorneys for the Defendant, The Saint Joe Mining Company.

DANIEL HARRINGTON, a witness produced on behalf of the said defendant, being first duly sworn, testified as follows:

Interrogatory I. What is your name, age and place of residence?

Interrogatory II. What is your occupation now and how long have you followed it?

Interrogatory III. Are you familiar with the prospecting, locating and developing of lode mining claims, and with the business of mining in general, and particularly with the same as carried on in West Mountain mining district in Salt Lake county, State of Utah?

Interrogatory IV. When and how long, if at any time, were you engaged in mining in said district at and near Bingham in said Salt Lake county?

Interrogatory V. Do you know Edmund H. Uhlig, and if so when and where and particularly during the years 1887 and 1888 and thereafter?

43 Interrogatory VI. Were you familiar in said years and afterwards with the ground in said district in the vicinity known as Saints Rest gulch, Revier gulch, No You Don't hill and Telegraph hill?

Interrogatory VII. State what you know of any mining operations by said Edmund H. Uhlig in said vicinity and particularly with reference to the lode locations of mining claims known as Uhlig No. 1, Uhlig No. 2 and Mute No. 1 claims?

Interrogatory VIII. State when and by whom, if within your knowledge, the locations mentioned in interrogatory VII were made?

Interrogatory IX. State whether within your knowledge the said Edmund H. Uhlig lived and worked upon the ground covered by the locations mentioned in the two last foregoing interrogatories, and if so, whether before, at the time or after the said locations were made?

Interrogatory X. State in what capacity, whether as owner, locator, lessee or otherwise, the said Edmund H. Uhlig worked upon said ground or any part of it, within your knowledge?

Interrogatory XI. State whether within your knowledge the

annual assessment work was done upon or for the benefit of any or all of said claims, and if so when and by whom?

Interrogatory XII. Describe fully all the improvements within your knowledge upon or for the benefit of said claims, what they were, when made and by whom?

44 Interrogatory XIII. If any such work was done in tunnels state where the mouth or mouths and in what directions and how far they run?

Interrogatory XIV. State whether you saw Edmund H. Uhlig on December 31st 1888, and if so where he was, what he was doing, and if he left you anywhere, state the place and in what direction he went?

Interrogatory XV. State whether you saw any stakes defining the boundaries of the claims described in interrogatory VII and if so when you saw them, and how many and what stakes they were?

Interrogatory XVI. State whether you saw the discovery points and location notices on said claims, and if so, when, upon what claims and what mining claims were referred to by such discoveries?

Interrogatory XVII. State if you know that Edmund H. Uhlig was particular in keeping the corners of claims located by him or in which he had an interest properly staked and particularly in reference to the three claims named in interrogatory VII?

Interrogatory XVIII. State whether you were familiar with the vicinity and particularly with said three claims so as to know of conflicts, if any, with said claims, or with the ground covered by them?

Interrogatory XIX. Were you upon the ground claimed by said three locations in the year 1889 and if so did you then or at any time thereafter down to the year 1898, see any discovery notices or monuments or boundary stakes of ground in conflict with said three claims, and if so what they were?

Interrogatory XX. Do you know of any work being done
45 upon or for the benefit of the three claims mentioned in interrogatory VII other than that done by Edmund H. Uhlig, or such persons as he authorized or were in company with him?

Interrogatory XXI. State whether you were employed at any time on ground known as the Yosemite ground in said district, and if so when and for how long?

Interrogatory XXII. State if you know, how the Yosemite ground is located with reference to the ground mentioned in interrogatory VII—what is the distance and whether in sight or not?

Interrogatory XXIII. Did Edmund H. Uhlig work for or with you at or near said Yosemite ground, and if so were you at that time familiar with his mining transactions. When was this?

Interrogatory XXIV. Did Edmund H. Uhlig live with or near you at any other times and if so when?

Interrogatory XXV. Did you go over the ground claims by the locations mentioned in interrogatory VII while you were in that

vicinity if at all, and if so was it sufficient to become familiar with the ground?

Interrogatory XXVI. Did you know of any other claims before 1898 than those owned in whole or in part by Edmund H. Uhlig or persons to whom he sold, on ground covered by these three locations?

Interrogatory XXVII. Do you know whether a lease was made by Edmund H. Uhlig and his co-owners of any or all of the claims named in interrogatory VII to R. E. Rex, James M. Garey, R. A. Hasbrouck or the Saint Joe Mining Company or either or all of them; if so state the fact?

46 Interrogatory XXVIII. State fully any other facts which you may know of your own knowledge on the subjects referred to in the foregoing interrogatories and explain fully such points as may not be fully and entirely answered before.

End of interrogatories on the direct examination.

47 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Affidavit of Attorney for Continuance.

STATE OF UTAH,
County of Salt Lake, } ss:

Albert W. Casey being first duly sworn on his oath says that he is one of the attorneys for The Saint Joe Mining Company, one of the defendants in the above entitled action; that one of the witnesses for the said defendant is one Daniel Harrington, by occupation a miner and formerly and since the commencement of this action a resident of said Salt Lake county; that affiant has made due inquiry and is informed and believes that said witness is now absent from said county and State, and has been since the present term of this court; that said defendant has stated to affiant that they have used due diligence since the setting of this action for trial to learn the present post office address and whereabouts of said witness, in this that they have inquired from time to time of persons likely to know, and this affiant has also similarly inquired but affiant has thus far been unable to learn the present whereabouts or abode of said witness or his post office address, except that he is believed to be within the State of Idaho or of Montana, and affiant is informed and has reason to believe that at or before the beginning of the next term of this court the place and abode or post office address of said witness will be known to this affiant so that said witness' testimony

by deposition can be taken or his personal attendance as a witness in said cause be procured in behalf of said defendant.

Affiant further says that the said Daniel Harrington is an important and material witness for said defendant in said cause and his testimony is necessary and material to the defense repre-
48 sented by affiant and without said testimony the said defendant cannot safely proceed to trial of said action and, if the personal attendance of said witness cannot be obtained it is the purpose of this affiant in behalf of said defendant to proceed in due form to procure his deposition when his place of abode is known.

The evidence expected to be obtained from said witness is in proof of the title continuance of occupation, possession and right of possession of defendant, its co-owners and grantors against and superior to the plaintiff and all other persons subject only to the paramount title of the United States.

Dated February 2, 1901.

ALBERT W. CASEY.

Subscribed and sworn to before me this 2nd day of February, A. D. 1901.

H. G. TWOMEY,

[SEAL.] *Notary Public in and for said Salt Lake County.*

49 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Affidavits on Motion for Continuance.

STATE OF UTAH, *County of Salt Lake,* } ss:

J. T. Taylor being first duly sworn on his oath says: That he is now and for more than seven years last past has been a physician and surgeon in regular and legal practice in Salt Lake City, and State of Utah; that he has personally examined in professional practice and consultation one James M. Garey who resides at number 216 West 1st South street in said Salt Lake City; that of his own knowledge said James M. Garey has been and now is confined to his bed with severe illness and much of the time in great pain and suffering and is wholly unable to attend to any business affairs whatever, and that any effort to induce said James M. Garey to do any business or to give information or testimony by deposition or otherwise would greatly menace his recovery and endanger his life; that said James M. Garey is *his* delirious in his said illness and was so on the date of this instrument, and unable to recognize

his acquaintances, and is not mentally able to perform business or work of any nature, and that from his present condition and the duration of said illness this affiant verily believes that said James M. Garey will be unable and incapable to perform any business or do any mental or physical labor for at least eight weeks from the present time although this affiant verily believes he will ultimately recover. Affiant has no interest in said cause.

J. T. TAYLOR, M. D.

Subscribed and sworn to before me this 25th day of January, A. D. 1901.

E. W. TAYLOR,
Notary Public in and for Salt Lake County.

50 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Affidavit of Attorney for Continuance.

STATE OF UTAH,
County of Salt Lake, } ss:

Albert W. Casey being first duly sworn on his oath says that he is one of the attorneys for The Saint Joe Mining Company, one of the defendants in the above entitled action; that one of the witnesses for the said defendant is one J. Nelson by occupation a miner and formerly and since the commencement of this action a resident of said Salt Lake county; that affiant has made due inquiry and is informed and believes that said witness is now absent from said county and State, and has been since the present term of this court; that said defendant has stated to affiant that they have used due diligence since the setting of this action for trial to learn the present post office address and whereabouts of said witness, in this that they have inquired from time to time of persons likely to know, and this affiant has also similarly inquired but affiant has thus far been unable to learn the present whereabouts or abode of said witness or his post office address, except that he is believed to be within the State of Idaho or of Montana, and affiant is informed and has reason to believe that at or before the beginning of the next term of this court the place and abode or post office address of said witness will be known to this affiant so that said witness' testimony by deposition can be taken or his personal attendance as a witness in said cause be procured in behalf of said defendant.

Affiant further says that the said J. Nelson is an important and material witness for said defendant in said cause and his testimony

is necessary and material to the defense represented by affiant
51 and without said testimony the said defendant cannot safely proceed to trial of said action and, if the personal attendance of said witness cannot be obtained it is the purpose of this affiant in behalf of said defendant to proceed in due form to procure his deposition when his place of abode is known.

The evidence expected to be obtained from said witness is in proof of the title continuance of occupation, possession and right of possession of defendant, its co-owners and grantors against and superior to the plaintiff and all other persons subject only to the paramount title of the United States.

Dated February 2, 1901.

ALBERT W. CASEY.

Subscribed and sworn to before me this 2nd day of February, A. D. 1901.

H. G. TWOMEY,

[SEAL.] *Notary Public in and for said Salt Lake County.*

52 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Affidavit on Motion for Continuance.

STATE OF UTAH,
County of Salt Lake, } ss:

R. A. Hasbrouck, being first duly sworn, on his oath says that he is now and for more than seven years last past has been a physician and surgeon in regular and legal practice in Salt Lake City, State of Utah; that he is now and for more than four weeks last past has been in attendance as the family physician, upon James M. Garey, who resides at No. 216 West First South street, in said Salt Lake City, and who, during said period has been and now is confined to his bed with severe illness and much of the time in great pain and suffering and wholly unable to attend to any business affairs whatever, and that any effort made to induce said James M. Garey to do any business or give information or testimony by deposition or otherwise would greatly menace his recovery and endanger his life; that said James M. Garey is continuously delirious in his said illness, and was so for more than fifteen days preceding the date of this instrument until three days last past and during said time unable to recognize his acquaintances and was not and is not mentally able to perform business or work of any nature; and that from his present

condition and the duration of his said illness this affiant verily believes that said James M. Garey will be unable and incapable to perform any business or do any mental or physical labor for at least eight weeks from the present time; that the physical and mental condition of said James M. Garey has improved within the last week and affiant believes he will eventually recover.

Affiant further says this affiant is and for more than three years last past has been the president of The Saint Joe Mining Company (a corporation) one of the defendants and party interested in this action; that during said last named period and now the said James M. Garey was and is an officer of and in the employ of said com-
53 pany and familiar with the ground and sources of titles to the same including the properties in controversy in this action; that the said James M. Garey has been familiar with and has personally performed and directed a large part of the work and business relating to said properties, including many of the acts required by law to maintain title and possession to the same and that many of the details of said matters are exclusively within the knowledge of said James M. Garey, which said details, by reason of said illness, he has been and is unable to communicate or testify to; that said James M. Garey is an important witness in the above entitled action and as one of the officers and principal employés of said company and partly interested in this cause, his presence, counsel and services are necessary and important to the trial of the same and without said James M. Garey's presence, counsel and services the defendant, said company, cannot safely or properly prepare and conduct its defense.

This affidavit is made in good faith and not merely for the purposes of delay.

R. A. HASBROUCK.

Subscribed and sworn to before me this 1st day of February, A. D. 1901.

H. G. TWOMEY,

[SEAL.] *Notary Public in and for said Salt Lake County.*

Dated February 1st, 1901.

54 In the District Court for the Third Judicial District in and for the County of Salt Lake, State of Utah.

G. LAVAGNINO
v.
G. LAVAGNINO. } Nos. 2285 and 2451.

Upon motion of Mr. A. W. Casey, attorney for the defendants in each of the within entitled causes, and Mr. N. W. Sonnedecker, attorney for the plaintiff not objecting thereto, it is ordered that said

defendants have, and they are hereby granted leave to amend their affidavits upon the motion for a continuance heretofore filed; and it is further — that said motion for a continuance be, and the same is hereby set for hearing for March 14th 1901, at the hour of ten o'clock a. m.

Dated March 13th, A. D. 1901.

55 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG, ALEX MCKERNAN, and THE Saint Joe Mining Company (a Corporation), Defendants.

Amended Affidavit of Attorney on Motion to Take Testimony.

Albert W. Casey, being first duly sworn, for amendment by leave of court to his affidavit dated March 11, 1901, in support of motion for continuance and to take testimony, on his oath says:

That in the month of January A. D. 1901, at or about the time of the commencement of the present term of this court, affiant was informed by R. A. Hasbrouck, the president of the Saint Joe Mining Company, one of the parties defendant in this action, that one Daniel Harrington was an important and material witness for said defendant in said cause whereupon said affiant then and there enquired of said R. A. Hasbrouck as to the whereabouts of said Daniel Harrington and was informed in reply that it was not then known, but that he was believed to be absent from the State. Immediately thereafter affiant again inquired in the said month of January of said R. A. Hasbrouck and also of R. E. Rex and affiant was then informed by said R. A. Hasbrouck that said Daniel Harrington was then believed to be either in the State of Montana or in the State of Idaho, in what particular part of said State or either of them was not known to affiant's informant, and said R. E. Rex said to affiant that he could and would ascertain the particular location of said Daniel Harrington. Affiant did not know of any other sources of inquiry than the foregoing but continued to make similar inquiries from the same persons at frequent intervals down to March 9th, 1901,

56 when he was first informed of the place of abode of said Daniel Harrington. Affiant also advised the said defendant by its president that it was necessary to show diligence to learn the whereabouts of said Daniel Harington in order that his evidence might be made available on the trial of said action.

On the ninth day of March current, affiant was first informed by said R. A. Hasbrouck that the whereabouts of said witness Harrington was known, as more fully appears in the affidavit of said R. A. Hasbrouck hereto attached, which said 9th day of March was upon Saturday and affiant immediately prepared the notice and affidavits

in the present motion and duly served the same on Monday the 11th day of said month of March 1901.

The evidence expected to be obtained from said Daniel Harrington is, as follows:

That said witness was well acquainted with Edmund H. Uhlig during the year 1888, and before and subsequently down to the time of said Uhlig's death in the year 1900. That said witness was well acquainted with the mining claim in West Mountain mining district, Salt Lake county, State of Utah known as the Uhlig No. 1, Uhlig No. 2 and Mute No. 1, and knows when they were located and knows that the first two of said claims were located by said Uhlig in his own name on the first day of January 1889, and that said Mute No. 1 claim was located by said Uhlig in behalf of himself and his co-partners one J. A. Slama, but in the name of said J. A. Slama in the year 1891. That said Uhlig lived upon said ground of said three claims in a house or cabin claimed and owned by said Uhlig and said Slama and one J. B. Taylor jointly, and that said Uhlig occupied said house or cabin in the year 1887 and from time to time each year thereafter down to the year 1898 and kept tools and supplies there for mining purposes continuously during said period; that said Uhlig worked upon said ground himself and with and in behalf of his said joint owners in each of said years and in
57 each year from the year 1890 to the year 1898 himself did or employ to be done upon said ground and upon ground contiguous thereto for the benefit thereof work and improvements to the amount of at least $100 for each of said last named years.

Witness was familiar with said ground and was frequently upon it during the period last named and a part of the time within said period was employed on ground known as the Yosemite ground distant about 2,000 feet and in sight of the ground of said three claims. Witness was on said ground of said three claims in the year 1889 and knows that the said Uhlig No. 1 and Uhlig No. 2 locations were made on January 1st, of said last named year and witness was on the ground soon after the said last named date and saw all of the ground and knows that no other claims stakes, discovery points, notices or monuments were made or erected or posted in the year 1889, nor thereafter down to the year 1898, in any way conflicting with said ground of said Uhlig claims; and that witness was on the ground of said Mute No. 1 claim in the year 1891, after its location, and knows that there were no other claims shown by stakes or monuments or notices of any kind in conflict with said Mute No. 1 ground down to and including the year 1897. Witness saw the stakes which were set for the corners of said three claims for their respective boundaries and the same were marked each with the name of the claim whose boundary it indicated, and witness saw the discovery monuments on each of said three claims and the notices thereon describing each claim as located 1500 feet long by 600 feet wide. Witness knows of the movements of said Edmund H. Uhlig in relation to his living upon and

working said ground of said three claims and a part of the period from 1889 to the year 1898, said Uhlig lived with or near witness for periods of several months at a time. Witness saw Edmund H. Uhlig when he went to make the said locations of said Uhlig No. 1 and Uhlig No. 2 claims on the night of December 31st, A. D. 1888, and said Uhlig told witness that he was going to take said ground for the purpose of making said location.

Dated March 14th, 1901.

ALBERT W. CASEY.

Subscribed and sworn to before me this 14th day of March, 1901

[SEAL.] CHARLES D. SAVERY,
Notary Public in and for said Salt Lake County.

58 In the District Court for the Third Judicial District in and for the *the* County of Salt Lake, State of Utah.

G. LAVAGNINO
v.
EDMUND UHLIG ET AL. } No. 2285.

G. LAVAGNINO
—
J. M. GAREY ET AL. } No. 2451.

The motion of the defendants in each of the within causes for a continuance and trial of said causes is now submitted to the court by Mr. A. W. Casey for the defendants herein, and Messrs. Sonnedecker & Street for the plaintiff, and the court having duly considered said motions and being now fully advised in the premises, it is ordered that said motions be, and each of them is hereby overruled and denied; to which the defendants except.

Dated March 14th, A. D. 1901.

59 In the District Court for the Third Judicial District in and for *the* the County of Salt Lake, State of Utah.

G. LAVAGNINO
v.
G. LAVAGNINO.

Comes now Mr. John A. Street, and by leave of court first had and obtained, enters his appearance as associate counsel for plaintiff herein; and now come Messrs. E. B. Critchlow and Arthur Brown, and by leave of court first had and obtained, enter their appearance as associate counsel for the defendants herein, and the within cause coming on now regularly for trial, Messrs. Sonnedecker & Street ap-

pearing as attorneys for the plaintiff herein, and Messrs. Casey, Critchlow and Brown for the defendants; whereupon, all being ready, G. Lavagnino and J. Fewson Smith are sworn and testify in behalf of the plaintiff, and said evidence being objected to by the attorneys for the defendants herein, it is after due consideration by the court, ordered that said objection be, and the same is hereby sustained, and R. A. Hasbrouck is sworn and testifies in behalf of the plaintiff, and the plaintiff rests, and after the opening statement by the defendants herein, L. P. Burton is sworn and testifies in behalf of the defendants and the further trial of the within case is continued until tomorrow morning at the hour of ten o'clock.

Dated March 25th, A. D. 1901.

60–64 In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah.

G. LAVAGNINO
v.
EDMUND H. UHLIG ET AL.

The attorneys for the plaintiff and the defendants herein all being present and ready, the further trial is now resumed; whereupon L. P. Burton, John V. Taylor, Dr. R. A. Hasbrouck and George A. Smith, are sworn and testify in behalf of the defendants; and the defendants rest; and A. P. Mayberry is sworn and testifies in behalf of the plaintiff in rebuttal, and the plaintiff rests, and the evidence being closed, said cause is submitted to the court without argument; whereupon it is now here considered, ordered and adjudged that findings of fact and decree be entered herein in favor of the defendants and against the plaintiff, adjudging and decreeing that the defendants herein are the owners of, in the possession, and entitled to the possession of the Uhlig No. 1 and Uhlig No. 2 Lode mining claims as described in the pleadings, and in accordance with the prayer of the defendants' answer herein.

Judgement entered in Judgment Book No. 8.

Dated March 26th, A. D. 1901.

65 In the District Court of the Third Judicial District of the State of Utah, County of Salt Lake.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Proposed Amendments to Findings of Fact.

Now comes the above named plaintiff and objects to each and every finding proposed by and on behalf of the defendants, and moves the court as follows, to-wit:

1st. To add to the first proposed finding of fact, the following: to-wit: "But the evidence showed that the St. Joe Mining Company had succeeded to the property claimed to be owned by Edmund H. Uhlig and Alex McKernan, and had been substituted as the party defendant instead of these two persons."

2nd. To insert in lieu of the third proposed finding of fact, the following:

"That the plaintiff herein introduced evidence in support of his complaint, showing that J. Fewson Smith, Jr., a native born citizen of the United States, on the 1st day of January, 1898, located the Yes You Do mining claim by making a discovery of mineral-bearing rock in place, and posted a location notice at the discovery; that he properly staked the claim, placing stakes at the four corners of the claim, and that he recorded a copy of his location notice.

66 & 67

"That the area covered by the "Yes You Do" location was formerly covered by a location called the "Levi P," but two days before the 1st day of January, 1898, one Andrew P. Mayberry, the owner of the "Levi P," told J. Fewson Smith, that he had not done the assessment work for 1897, and was not going to do it, and Smith notified him that he was going to relocate the ground. That he performed upon the "Yes You Do" claim more than $50.00 worth of work within ninety days by sinking a shaft in blasting rock about thirteen feet deep and 4 x 6 feet wide.

"That G. Lavagnino, the plaintiff, had declared his intention to become a citizen of the United States before the "Yes You Do" claim was located.

"That it appeared in evidence before plaintiff's case was closed that J. Fewson Smith, Jr., was at the time of his location of the "Yes You Do" claim a United States deputy mineral surveyor, acting as such in the State of Utah.

"After the foregoing evidence had been admitted on behalf of plaintiff, counsel for plaintiff offered in evidence the recorded location notice of the "Yes You Do" claim, together with a deed to said claim from J. Fewson Smith to G. Lavagnino, the plaintiff, and said offer was objected to on behalf of the defendants, upon the grounds that under sections 452 and 2319 of the Revised Statutes of the United States, J. Fewson Smith, Jr., being at the time of the attempted location a United States deputy mineral surveyor, he could not make a valid location, and that the attempted location by said Smith was null and void.

"Thereupon the court sustained the objection to the admission of said recorded location notice, and said deed and placing its ruling expressly on the construction of said two sections of the United States statutes, held that said section 452 qualified said section 2319 to the extent that the right of J. Fewson Smith, Jr., to make the "Yes You Do" location would be prohibited as a matter of public policy, and, therefore, was null and void, and that the subsequent conveyance of

said "Yes You Do" claim to the plaintiff would not give any validity to the location.

"Thereupon plaintiff, reserving exceptions to the rulings of the court, offered in detail to prove the remaining allegations of the complaint, and the defendants, by their counsel, objected to the admission of such evidence upon the ground that the "Yes You Do" location, having been held invalid by the court, the said evidence offered was immaterial, and the court sustained the objection upon said ground, to which ruling plaintiff excepted."

68 Third. To strike out the following words from line 3 of the fourth proposed finding of fact, to-wit, "the unoccupied and unappropriated."

Fourth. To insert a finding as follows: "That the plaintiff, on rebuttal, offered to prove by competent evidence that on the 1st day of January, 1889, at a time antecedent to the alleged location of the said "Uhlig No. 1" and said "Uhlig No. 2" Lode mining claims, hat said Andrew P. Mayberry made a valid location of the two lode mining claims named the "Levi P" and the "Veta," covering the discoveries of both the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, and completely covering the area in conflict between the "Yes You Do" claim and the "Uhlig No. 1 and 2" Lode mining claims, and he continued in possession of the said "Levi P" and "Veta" claims, and performed all labor required by the United States and the rules of the West Mountain mining district, up to and including the year 1896, but the court ruled that the evidence was inadmissible, for the reason that the said Andrew P. Mayberry had filed no adverse claim in the United States office against the application for patent for the said "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, and that the plaintiff was not entitled on his own behalf, or his counsel on behalf of the United States Government, to raise the question whether or not the ground covered by the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims was lawfully occupied at the time of the purported location of said "Uhlig No. 1" and said "Uhlig No. 2" claims.

N. W. SONNEDECKER AND
DEY & STREET,
Attorneys for Plaintiff.

69 STATE OF UTAH, }
County of Salt Lake, } ss:

In the District Court of the Third Judicial District.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly for hearing before the court on the 25th day of March, 1901, John A. Street Esq., and N. W. Sonne-

decker, Esq., appearing in behalf of plaintiff, and Arthur Brown, Esq., A. W. Casey, Esq., and E. B. Critchlow Esq., appearing in behalf of the defendant, The Saint Joe Mining Company, and the court having heard the testimony adduced by the respective parties, and having considered the same and the records and files in the cause, and the arguments of counsel, and being fully advised thereon, now makes and files the following as its

Findings of Fact.

1. That the plaintiff herein has failed and neglected to prosecute his action against the above named defendant, Alex McKernan, and that prior to the trial of this cause the said action of plaintiff as to the defendant Alex McKernan was by the court dismissed.

70 2. That after the commencement of this action, and before the trial of the same the defendant, Edmund H. Uhlig, assigned, transferred and conveyed to the St. Joe Mining Company, a corporation under the laws of Utah, all his right, title and interest in and to the premises in the complaint and answer herein described as the "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims, and by an order duly entered in this cause the said St. Joe Mining Company was and is substituted in lieu of the said Edmund H. Uhlig as defendant herein.

3. That the plaintiff herein introduced upon the trial of this cause no legal or competent evidence to sustain the allegation- *to sustain the allegations* of the complaint, or to sustain the issues upon the part of plaintiff, and upon the trial, on motion of counsel for defendants, the said action of the plaintiff against the defendant was and is hereby dismissed.

4. That on or about the 1st day of January, 1889, one Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain mining district, Salt Lake county, State of Utah, and having discovered thereon a lode of mineral-bearing rock in place-bearing lead, iron, silver and other minerals, did then and there locate the same as the "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims, by marking the boundaries thereof upon the ground by suitable monuments, so that the boundaries thereof could be readily traced, and by posting at the points of discovery upon said mining claims respectively notices of location, describing the same by reference to natural objects and permanent monuments; that thereafter he caused copies of said notices of location, respectively, to be duly filed and recorded in the office of the district recorder of said West Mountain mining district.

5. That thereafter the said Edmund H. Uhlig and the defendant, The St. Joe Mining Company, remained in possession of said mining claims, working and developing the same and causing to be done

thereon and for the benefit of said claims in each and every year up to and including the year 1900 the annual assessment work required by the laws of the United States.

6. That thereafter, by divers deeds properly executed and of record in the office of the county recorder of Salt Lake county, Utah, the said Edmund H. Uhlig conveyed all of said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims to the defendant, The St. Joe Mining Company, and to Alex McKernan, and that prior to the commencement of this action, to-wit, on the 24th day of August, 1898, the said Edmund H. Uhlig, the predecessor in interest of the Saint Joe Mining Company, and the said Alex McKernan, in due
71 form, made application for United States patent for the said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims in the United States land office at Salt Lake City, Utah, against which said application the plaintiff herein filed his adverse claim, and afterwards brought this action against the said defendants for the purpose of determining the title and right of possession of the premises set forth and described in the complaint herein as the area in conflict between the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, and the alleged "Yes You Do" mining claim.

7. That the full and complete description by metes and bounds of the said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims is as follows, to-wit:

With magnetic variation at 16 degrees 28 minutes east: Commencing at corner No. 1 of said "Uhlig No. 1" claim, and running north 20 degrees 12 minutes, west 145.5 feet to corner No. 4 of said "Uhlig No. 2" claim; thence north 50 degrees 38 minutes, east 1437.8 feet to corner No. 1 of said "Uhlig No. 2" claim; thence south 20 degrees 12 minutes, east 600 feet to corner No. 2 of said "Uhlig No. 2" claim; thence south 50 degrees 38 minutes, west 1437.8 feet to corner No. 3 of said "Uhlig No. 2" claim; thence south 20 degrees, 12 minutes, east 145.5 feet to corner No. 2 of said "Uhlig No. 1" claim; thence south 76 degrees 36 minutes, west 1151.9 feet to corner No. 3 of said "Uhlig No. 1" claim; thence north 20 degrees 12 minutes, west 522.9 feet to corner No. 4 of said "Uhlig No. 1" claim; then north 72 degrees 46 minutes, east 1145.3 feet to corner No. 1 of said "Uhlig No. 1" claim, the place of beginning.

The northwest corner of section 32, township 3 south, range 2 west, Salt Lake meridian, bears as follows: From corner No. 1 of said "Uhlig No. 1" claim, north 60 degrees 28 minutes, east 10,255.6 feet; and from corner No. 1 of said "Uhlig No. 2" claim, north 62 degrees 59 minutes, east 8823.9 feet.

From the foregoing facts the court finds as its

Conclusions of Law.

First. That the plaintiff, G. Lavagnino, is not entitled to any relief whatsoever in this action as against the defendants, or either of them,

and that the action against the defendants should be dismissed with costs against the plaintiff.

Second. That the defendant, The St. Joe Mining Company, and the defendant Alex McKernan are the owners in possession and entitled to the possession as against the *the* plaintiff and all other persons, excepting as against the United States, of the premises in the foregoing findings of fact described as the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, situate in West Mountain mining district, Salt Lake county, Utah, and that the said defendant, The St. Joe Mining Company, is entitled as against the plaintiff and against all persons whomsoever to proceed to purchase from the United States of America the said premises and the whole thereof.

72 Third. That a decree quieting the title of the defendant St. Joe Mining Company and Alex McKernan to the premises in conflict should be entered against the said plaintiff, and that the said defendant, The St. Joe Mining Company, should recover of and from the plaintiff its costs herein to be taxed.

Done in open court this 13th day of December, 1901.

WILLIAM C. HALL, *Judge.*

Attest: JOHN JAMES, *Clerk,*
By GEO. G. ARMSTRONG,
Deputy Clerk.

Filed December 13, 1901.

73 STATE OF UTAH, } ss:
County of Salt Lake, }

District Court, Third Judicial District.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.

Decree.

This cause having heretofore been brought on for trial before the court, plaintiff herein appearing by John A. Street, Esq., and N. W. Sonnedecker, Esq., and the defendant herein, The St. Joe Mining Company, duly substituted herein as party defendant by order of court in lieu of Edmund H. Uhlig, appearing by Arthur Brown, Esq., A. W. Casey, Esq., and E. B. Critchlow, Esq., and the court having heretofore rendered its decision, and having filed its findings of fact and conclusions of law,

Now, therefore, upon motion of counsel for defendants, it is hereby ordered, adjudged and decreed that the plaintiff herein take nothing by his said action, and that his complaint herein be and the same is hereby dismissed.

It is further ordered, adjudged and decreed that the defendant, The St. Joe Mining Company and Alex McKernan, are the owners in possession and entitled to the possession, except as against the paramount title of the United States, of all those certain premises situate in West Mountain mining district, Salt Lake county, Utah, known as the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, described by metes and bounds, with magnetic variation at 16 degrees 28 minutes east, as follows, to-wit:

Commencing at corner No. 1 of said "Uhlig No. 1" claim, and running north 20 degrees 12 minutes, west 145.5 feet to corner No. 4 of said "Uhlig No. 2" claim; thence north 50 degrees 38 minutes, east 1437.8 feet to corner No. 1 of said "Uhlig No. 2" claim; thence south 20 degrees 12 minutes, east 600 feet to corner No. 2 of
74 & 75 said "Uhlig No. 2" claim; thence south 50 degrees 38 minutes, west 1537 feet to corner No. 3 of said "Uhlig No. 2" claim; thence south 20 degrees 12 minutes, east 145.5 feet to corner No. 2 of said "Uhlig No. 1" claim; thence south 76 degrees 36 minutes, west 1151.9 feet to corner No. 3 of said "Uhlig No. 1" claim; thence north 20 degrees 12 minutes, west 522.9 feet to corner No. 4 of said "Uhlig No. 1" claim; thence north 72 degrees 46 minutes, east 1145.3 feet to corner No. 1 of said "Uhlig No. 1" claim, to the place of beginning.

The northwest corner of section 32, township 3 south, range 2 west, Salt Lake meridian, bears as follows: From corner No. 1 of said "Uhlig No. 1" claim; north 60 degrees 28 minutes, east 10,255.6 feet; and from corner No. 1 of said "Uhlig No. 2" claim, north 62 degrees 59 minutes, east 8823.9 feet.

And it is further ordered, adjudged and decreed that the title of the said defendants in and to said premises, and each and every part thereof, is hereby quieted and confirmed, as against the plaintiff and as against all persons whomsoever.

And it is further ordered, adjudged and decreed that the defendants herein, The St. Joe Mining Company and Alex McKernan, are entitled to prosecute their application to purchase from the United States of America all of said premises hereinbefore described.

And it is further ordered, adjudged and decreed that the defendant, The St. Joe Mining Company, do have and recover from the plaintiff its costs herein taxed at the sum of $14.30.

Done in open court this 13th day of December, 1901.

WM. C. HALL, *Judge.*

Attest:

JOHN JAMES, *Clerk,*
By GEO. G. ARMSTRONG,
[SEAL.] *Deputy Clerk.*

76 In the Third District Court of Utah, Salt Lake County, Department No. 1.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } No. 2285.

Notice of Motion for New Trial.

To the defendants in the above entitled cause and to Pierce, Critchlow & Barrette, their attorneys:

You will please take notice that the plaintiff above named will move the court on the 31st day of December, 1901, or so soon as counsel can be heard, at 10 o'clock of said day at the court room of said department No. 1, in Salt Lake City to set aside the decision of said court herein and grant a new trial, for the following reasons:

1. Insufficiency of the evidence to justify the decision, and that the decision is against law.
2. Errors of law occurring at the trial excepted to by plaintiff.

The motion will be based upon the files, records and minutes of the court in said case.

N. W. SONNEDECKER AND
CHARLES C. DEY,
Attorney- for Plaintiff.

Service of a copy of the above accepted this December 26th, 1901.

PIERCE, CRITCHLOW & BARRETTE,
Att'ys for Defendants.

77 Third District Court Rooms.

JANUARY 6, 1902.

G. LAVAGNINO, Plaintiff,
v.
E. H. UHLIG ET AL., Defendants. } No. 2285.

N. W. Sonnedecker for plaintiff.
D. H. Wenger, for def't.

Whereas the parties hereto have this day submitted motion for new trial herein, and the court being fully advised thereon, it is now therefore ordered that the said motion of plaintiff for new trial be and it is hereby denied.

WM. C. HALL, *Judge.*

78 In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah.

G. LAVAGNINO
v.
E. H. UHLIG ET AL. } No. 2285.

The motion for a new trial herein being now submitted without argument for the respective parties hereto, and the court having considered, and being now fully advised in the premises, it is ordered that said motion be and the same is hereby denied.
Dated January 6, 1902.

79 In the Third Judicial District Court in and for the County of Salt Lake, State of Utah.

GIOVANNI LAVAGNINO, Plaintiff,
vs.
EDMUND H. UHLIG, ALEX MCKERNAN, and THE ST. JOE MINING Company, Defendants.

Notice of Appeal.

To the defendants above named, and to D. H. Wenger, Esq., and Pierce, Critchlow and Barrette, their attorneys:

Please take notice that the plaintiff in the above entitled action hereby appeals to the supreme court of this State, from the decree therein made and entered in the said district court of the third judicial district, on the 13th day of December, 1901, in favor of the defendants in said action, and against said plaintiff, and from the whole thereof.

N. W. SONNEDECKER AND
C. C. DEY,
Attorneys for Plaintiff.

Service of the above notice accepted, and a copy thereof received this 25th day of April, 1902.

PIERCE, CRITCHLOW AND BARRETTE,
Attorneys for Defendants.

80 In the District Court of the Third Judicial District in and for the County of Salt Lake.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } No. 2285.

I, John James, clerk of the district court, in and for Salt Lake county, State of Utah, do hereby certify that the above and foregoing and hereto attached files contains all of the original papers filed in this court in the case of Lavagnino *v.* Uhlig, *et al.*, No. 2285, including the original bill of exceptions and notice of appeal, together with true copies of the original orders made by the court thereon, the same constituting the judgment roll therein.

And I further certify that an undertaking on appeal, in due form has been properly filed, and that the same was filed on the 8th day of May A. D. 1902.

And I further certify that said judgment roll is by me transmitted to the supreme court of the State of Utah pursuant to such appeal.

Witness my hand and the seal of said court at Salt Lake City, Utah, this 12th day of May, A. D. 1902.

[SEAL.] JOHN JAMES, *Clerk*,
By GEO. G. ARMSTRONG, *Deputy*.

81 In the Third Judicial District Court (Division No. 1) in and for Salt Lake County, State of Utah.

GIOVANNI LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } No. 2285. Bill of Exceptions.

This cause came regularly on for trial on Monday the 25th day of March, 1901, before Hon. William C. Hall, judge presiding.

Appearances.

For the plaintiff: N. W. Sonnedecker, Esq., and Messrs. Dey & Street.

For the defendants: Albert W. Casey, Esq., Messrs. Brown & Henderson, Messrs. Pierce, Critchlow, and Barrette.

Reporter's transcript of testimony and proceedings.

Marked: Filed after settlement, April 14, 1902. John James, clerk, dist. court of Salt Lake county, Utah, by Geo. G. Armstrong, deputy clerk.

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83 MONDAY, *March* 25, 1901.

Mr. SONNEDECKER: In this case and the following one, I desire the record to show that Judge Street is associated with me in behalf of the plaintiff.

The COURT: The record may show that fact.

Mr. CASEY: At this time I desire the record to show that Mr. Critchlow is associated with me in this matter, and also Senator Arthur Brown.

The COURT: The record may show those facts.

A brief statement of the issues involved in this cause was made to the court by counsel for the respective parties, after which the following proceedings were had:

GIOVANNIA LAVAGNINO, sworn on behalf of the plaintiff, testified as follows:

Examination by Judge STREET:

Q. What is your name?
A. Giovanni Lavagnino.
Q. Where do you live?
A. Salt Lake City.

Q. Of what country are you a native?
A. Of Italy.
Q. Did you at any time declare your intention to become a citizen of the United States?
A. Yes sir.

Mr. CRITCHLOW: We object to it as being incompetent—as being a matter which can be proven only by the records of the court, and we make this objection generally now to this whole class of testimony, should your honor be inclined to rule adversely to us, and we will take an exception to all this testimony.

The COURT: The court overrules the objection. The statutes of the United States, I take it, provide that the proof of citizenship can be made by the witness himself as to whether he is a citizen of the United States, native born or a naturalized citizen, or whether he has declared his intention to become such.

84 (Judge STREET:)

Q. I will ask you where you declared your intention to become a citizen of the United States?
A. In Leadville, Colorado.
Q. Do you know what county that is in?
A. In Lake, I believe.
Q. I will ask you whether at the time you declared your intention you received from the clerk of the court at that place any document with respect to it?

(Counsel exhibits a paper to witness)

A. Yes sir; that is the paper I received at that time.
Q. And is that your signature to the document?
A. Yes, sir; that is my signature, made at the time.
Q. Did you receive this from the clerk of the court?
A. Yes sir.

Judge STREET: We offer this document in evidence.

Mr. CRITCHLOW: We object to it, for the special reason that it is incompetent, not being authenticated as required by act of Congress and by the statutes of this State pertaining to the authenticity of the records of courts of sister States; and we object to the evidence generally for the reason that it is immaterial and irrelevant as to the testimony of this witness.

The COURT: This appears to be the original document that was issued to the witness respecting his declaration of intention to become a citizen of the United States. It appears to be under the hand and seal of a court of competent jurisdiction, and the objections will be overruled, and the paper introduced in evidence in connection with the testimony of the witness.

Exception by counsel for the defense.

85 Document above referred to, which is marked by the reporter "Plff't'f's Ex. No. 1—J. W. P. March 25th, 1901" reads, as follows:

STATE OF COLORADO, } ss:
County of Lake, }

I, Giovanni Lavagnino, do solemnly declare on oath to Charles W. Taylor, clerk of the district court of the fourth judicial district of the State of Colorado, in and for the county of Lake, that it is *bona fide* — intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty whatever, and particularly to Humbert, King of Italy, whereof I was heretofore a citizen or subject.

(Signed) GIOVANNI LAVAGNINO.

Subscribed and sworn to before me this 23rd day of August, 1880.

CHARLES W. TAYLOR, *Clerk*,
By WM. RAYMOND, *Deputy Clerk*.

STATE OF COLORADO, } ss:
County of Lake, }

I, Charles W. Taylor, clerk of the district court of the fourth judicial district of the State of Colorado, within and for the county of Lake, do hereby certify that the above is a true copy of the declaration of Giovanni Lavagnino, an alien, duly made before me, and filed in my office on the 23rd day of August, A. D. 1880.

Given under my hand and the seal of said court this 23rd day of August, A. D. 1880.

[SEAL OF COURT.] CHARLES W. TAYLOR, *Clerk*.
By WM. RAYMOND, *Deputy Clerk*."

(Judge STREET:)

Q. Now, out of its order: Did you purchase the Yes You Do mining claim?

A. Yes sir.

Q. From whom?

A. J. Fewson Smith, Jr.

Q. I will ask you whether that is the original deed you received from Mr. Smith? (Exhibiting paper to witness.)

A. Yes, sir:—

(Mr. CRITCHLOW:)

Q. I see the consideration is one dollar. Was that the amount of the consideration paid?

Judge STREET: We object to that as irrelevant and immaterial.

The COURT: What is the object of that?

Mr. CRITCHLOW: To show that the deed is not a competent deed under the act of Congress. It has no revenue stamp on it; and if it exceeds in value more than $100, it would require a revenue stamp on it.

86 The COURT: Proceed with your examination.

(Mr. CRITCHLOW:)

Q. Is that the amount of consideration you paid $1?
A. No sir.
Q. Did you pay any consideration?
A. Not yet.
Q. Then Mr. Smith still——
A. (Interrupting.) I paid money, but not to Mr. Smith as a consideration—not yet.
Q. Then he still has an interest in the property?
A. Well, I have an agreement with him as to what I have to pay.
Q. This agreement is in writing?
A. I think it is.
Q. Well it is, of course, isn't it?
A. I didn't happen to see it since then; but I think I must have it somewhere.
Q. Are those premises not worth more than $100?

Judge STREET: We object to that as irrelevant and immaterial.

The COURT: I suppose, under the act of Congress, they object to the deed in evidence, as being entitled to be received as such because it has not been stamped according to law.

Judge STREET: In order to entitle the deed to record, perhaps, it might under certain circumstances require a revenue stamp; but as to passing title between the parties where the title to the claim is not litigated at all, and where there is simply an area in conflict, I insist the instrument is competent.

The COURT: I have held, where the parties have failed to stamp a deed through inadvertance or through some misunderstanding, that they could at the present time place the stamp required on it by the revenue act to entitle the paper to be received in evidence. The authorities differ on that, but I have held that once before.

87 Judge STREET: We would not offer it at this time, then, if your honor please. We will hold it until we ascertain the facts with respect to it. I am certain that there was no attempt to evade the internal revenue law on this deed. We desire to ascertain the facts with respect to it, and we can offer it later.

Mr. CRITCHLOW: In order to keep the record straight, I move to strike out all the testimony of the witness in regard to his declaration of intention to become a citizen of the United States.

The COURT: The motion will be overruled.

Exception by counsel for defense.

J. FEWSON SMITH, JR., sworn as a witness on behalf of the plaintiff, testified as follows:

Examination by Judge STREET:

Q. Your name is J. Fewson Smith, Jr.?
A. Yes, sir.
Q. Where do you live?
A. This city.
Q. Are you a citizen of the United States?
A. Yes, sir.
Q. Native born?
A. Yes, sir.
Q. Did you locate the Yes You Do mining claim in the West Mountain mining district?
A. Yes, sir.
Q. When did you locate it?
A. 1898.
Q. What day?
A. 1st of January.

Mr. CRITCHLOW: I suppose this is merely preliminary, and not to prove the ultimate facts?

Judge STREET: Yes; we simply identify him as the person who did so.

(Judge STREET:)

Q. On the day that you located the claim did you make any discovery of mineral bearing rock in place?
A. Yes.
88 Q. State what you did with respect to posting notices, if anything?
A. I posted a location notice at the discovery.
Q. Did you record or file for record a copy of that notice?
A. Yes, sir.
Q. What did you do with respect to staking your claim?
A. I staked—put stakes at the four corners of the claim.
Q. As described in the notice?
A. Yes, practically.

Mr. CRITCHLOW: We object to that as being a conclusion. He should state where he placed them.

(Judge STREET:)

Q. Did you describe the location of your stakes in your notice?
A. Yes sir; I did.

The COURT: Let the witness state what he did.

(Judge STREET:)

Q. What is your profession?

A. A surveyor.
Q. Are you a United States deputy mineral surveyor?
A. Yes sir.
Q. Have you prepared a map which correctly shows the location of the Yes You Do claim with respect to any surrounding or adjoining patented ground?
A. Yes sir.
Q. What claim, what patented claim, did you tie to?
A. The No You Don't, lot No. 992.
Q. That is the same claim that is mentioned in your location notice is it not?
A. Yes sir.
Q. Now I will ask you to examine this copy and state whether or not it is a copy of the notice that you posted and recorded? (Exhibiting a paper to witness)
A. Well that seems to be a correct copy, as near as I can remember the description of the boundaries.

Judge STREET: We desire to offer this certified copy.
Senator BROWN: We want to cross-examine him first.
The COURT: You may cross-examine him upon it.

89 (Mr. CRITCHLOW:)

Q. You located or attempted to locate this ground, when?
A. The 1st of January, 1898.
Q. Were you yourself on the premises at that time?
A. Personally—yes, sir. I was there.
Q. At that time?
A. I waited there till the whistles blew for midnight, and then I put up my notice—waited some little time, to get into the New Year.
Q. You say you are a civil engineer and deputy surveyor?
A. Yes sir.
Q. Were you such at the time?
A. Yes sir.
Q. And had been for a number of years?
A. Yes sir.
Q. What years—since when have you been a deputy United States mineral surveyor?
A. I can't tell you—sometime between seven and twelve years. I became a deputy United States mineral surveyor about the time the first Liberal administration was inaugurated.
Q. About 1891.
A. I believe that is right.
Q. What you mean by deputy United States mineral surveyor is, attached to the office of the surveyor general for the district of Utah?
A. Yes, that explains it.

Q. You have stated that you put up some corners on this claim. Did you put up any?

A. I put up the corners—yes sir.

Q. Tell me where you put up the discovery stake, if you did put one up?

A. If I did?

Q. Yes.

A. I put it up, where?

Q. Describe it on the ground. What kind of a place was it on the ground?

A. Why, it was in the neighborhood—within a few feet, I mean of what appeared to me in the moonlight as a place where work had been done on the top and some little distance from the edge of a very conspicuous prominent quartzite outcrop.

90 Q. How long was this quartzite outcrop?

A. I can't state exactly how long. It was a very conspicuous blow-out.

Q. Was it half a mile long?

A. Oh, no, no; just a few feet—less than fifty feet.

Q. In length?

A. In length.

Q. Did you put up a stake there that night?

A. Yes—well, yes; I put up a board nailed to a stake.

Q. What kind of a board?

A. I think I put up a 12 inch pointed board. It wasn't nailed to a stake as I recollect.

Q. Did you put up a stake?

A. Well, that was the stake. No, I don't believe I did put up a stake. A small upright stick I believe I used, with a 12 inch board, pointed; although it might have been that I nailed such a board to the stake.

Q. Did you put up that notice that night?

A. Yes sir.

Q. And you took a copy of it and recorded it did you?

A. I made the notice out in duplicate before going on the ground.

Q. You were familiar with the ground then, were you?

A. Yes sir.

Q. How did you come to be familiar with it?

A. From having made surveys in that country and all through Bingham.

Judge STREET: I understood that was a special cross-examination as to this notice. I hadn't completed my examination of the witness, and the scope of the cross-examination seem- to be not that of examination on the *voir dire* as to the admissibility of the evidence, but a general cross-examination.

Mr. CRITCHLOW: Isn't your offer of the notice as a document? Isn't that what you offer? That is what we want to cross-examine him upon.

91 Judge STREET: Yes; but you seem to be going into a general cross examination.

The COURT: The examination in chief of the witness was confined to the discovery of a vein of rock in place carrying mineral, putting up stakes at the four corners, and the posting of the discovery notice and the recording of the copy. That was the extent of the examination in chief.

Senator BROWN: We don't care so much about whether it is cross-examination of what he said in chief, but it is with a view of determining whether this paper is admissible; therefore we think we have a right to cross-examine him upon anything which would bear upon the admissibility of the paper itself.

The COURT: The court so understands, and will afford you that opportunity.

(Mr. CRITCHLOW:)

Q. You say that you know in a general way this ground from having made mineral surveys?

Judge STREET: We object to it as not proper cross-examination at this time in view of the fact that we haven't turned the witness over to the defense.

The COURT: I think, under the circumstances, the witness had better be handed back to the other side and let them complete his examination.

Mr. CRITCHLOW: Very well.

Judge STREET: We offer the notice.

Senator BROWN: We object to the notice. We want some more examination before the notice comes in.

The COURT: The court will hold that the party calling the witness will examine him fully as to the discovery and what he did towards the location of this claim before he makes that offer.

92 Judge STREET: We submit that we have shown what the United States statutes calls for as preliminary to offering the notice.

(Judge STREET:)

Q. What did you do with respect to performing the work on the Yes You Do lode after having made your discovery and staked out your claim?

A. I proceeded to perform $50 worth of work within a period of ninety days.

Q. State where you did that work?

A. It was done just practically at the discovery—just a little bit to the northerly from the discovery, within a few feet.

Q. How much work was done there?

A. I think there was a 13 feet of a shaft sunk, an incline shaft—about that.

Q. What class of work was this?

A. In rock.
Q. How many feet?
A. About 13; that is my recollection.
Q. Of what character of work?
A. Why it was blasting rock, and the shaft was about 4 x 6 feet, thereabouts average up.
Q. Did you do the work yourself, personally?
A. You mean, perform the manual labor?
Q. Yes.
A. No sir.
Q. Did you pay for it?
A. Yes sir.
Q. How much did you pay?
—. $51 and some cents.
Q. Who performed this work?
A. A man named Despain, a man whose name I don't recollect now, and a man named Thomas Pells.
Q. Did you know at the time you located this ground of a claim called the Levi P. Had you examined as to the location of that claim?
A. Why——
93 Q. (Continuing:) I mean where it was located on the ground?
A. I had inquired.
Q. Of whom?
A. Of Mr. A. P. Mayberry.
Q. Do you know whether or not he was the owner of the Levi P. claim previous to the time you located it?

Mr. CRITCHLOW: We object to that as incompetent, and not the proper way to show ownership.
Judge STREET: We will supplement it. It relates to the abandonment of the Levi P. claim, and we will supplement it with proof that Mr. Mayberry was the actual owner of the Levi P. claim up to the time of this abandonment.
The COURT: Is that claim or a portion of it within the exterior boundaries of the Yes You Do?
Judge STREET: The Yes You Do is entirely within the boundaries of the former claim the Levi P., and it purports to be a relocation of the Levi P.
The COURT: Does the notice of location have any reference to the Yes You Do being a relocation of this claim?
Judge STREET: Yes, it purports to be a relocation of the Levi P. in the notice.
The COURT: It seems to me that you would have to show that that claim had been abandoned or was subject to relocation at the time you made your location.
Judge STREET: We expect to do it in our direct case.
The COURT: You may proceed.

A. I say I inquired. I can't answer just to that question. I knew Mr. Mayberry had located the claim.

Q. And did you know he was claiming the ownership of that claim?

94 A. I knew he was claiming the ownership up to the time when I made the relocation.

Q. Before you made the location of the Yes You Do lode, state whether anything was said to Mr. Mayberry with respect to any intention to further claim or work the Levi P. lode.

Mr. CRITCHLOW: We object to that as being incompetent, for the reason that it is hearsay as against us.

The COURT: From the statement made by Judge Street, that he expects to supplement the testimony of the witness by showing that Mr. Mayberry was the owner of the Levi P., it is admissible to show the intention of the owner, as to whether he intended to, or rather had abandoned the claim, and did'nt intend to represent it, as bearing upon the question of forfeiture and right to relocate.

Mr. CRITCHLOW: I don't understand that Mr. Street's offer is to show anything in the way of forfeiture, but to show something in the way of abandonment. If it were to prove forfeiture, it would be immaterial and irrelevant; if it were to prove actual abandonment, that would be another matter.

The COURT: I don't know what the witness will testify, and don't know what Mr. Mayberry may have said. His statements might possibly bear upon either issue. I will let him answer the question, and give you an exception.

A. Mr. Mayberry said to me that he was pretty sick of doing assessment work and paying for assessment work on certain claims, and in talking about the claims the position of this particular claim came up; and I was a little surprised that he——

Q. Tell what he said?

A. He said he was going to discontinue doing and paying for assessment work on certain claims, and this claim was one of them; and he stated that to me on two occasions, the last being the

95 day before the New Year. I asked him—well, I think I asked him, at least he told me that he had not done the work, and what was more he wasn't going to do the work. I said "Then I will go and locate it." That is the substance of the conversation.

Mr. CRITCHLOW: We now move to strike that out, because it appears from the testimony of the witness that it is not a statement of abandonment by Mr. Mayberry, but simply a statement on his part that he didn't think he would continue his assessment work. Of course, I don't have to go into any explanation or argument upon the difference between abandonment and forfeiture. If this ground was forfeited by failure to do the work for 1897, so that it became open to relocation, then no statement upon the part of Mr. Mayberry is

necessary to complete the forfeiture, and the statement, whatever it was, becomes immaterial. If they claim that he located this because at the time he located it it was upon an existing and valid claim under the mineral laws of the United States excepting the fact that it was then and there abandoned by Mr. Mayberry, then probably your honor would be correct in holding that his actual statement, that he did then and there abandon it, would make it revert back to the mineral lands of the United States and make it subject to relocation. I move therefore to strike out that testimony as immaterial and irrelevant.

The COURT: Abandonment is a question of intention. The owner of the land stated in conversation with the witness that he was tired of spending money to pay assessment work upon a number of mining claims, and this one among the number. Subsequent to that, and a few days before the termination of the year, he also
96 stated to the witness that he hadn't done the assessment work upon this claim, and that he didn't intend to. I think it has a bearing upon both propositions; at least, within two days of the time within which the assessment work should have been done, the owner said that he hadn't done it and didn't intend to do it. I will let it stand.

Exception by counsel for defense.

(Judge STREET:)

Q. Have you platted on the map that is hibited here the location of the Yes You Do claim?

A. Yes sir.

Q. With reference to the No You Don't, lode, lot No. 99.

A. Yes sir.

Q. Does that map correctly show the location of the Yes You Do claim with reference to the No You Don't and with reference to the description in your location notice that you posted on the ground?

A. Yes sir.

Q. And also the notice you recorded?

A. Yes sir.

Q. What is the section of the map in blue?

A. The blue boundary and color shows the Uhlig No. 1, survey No. 3683.

Q. I ask you about the solid mass of blue?

A. That shows the area in conflict between the claim I mentioned and the Yes You Do.

Q. And the area, the solid area in green which is shown on that map?

A. The area in conflict between the Uhlig No. 2, survey 3684, and the Yes You Do.

Q. The Yes You Do appears within the heavy red lines, does it?

A. Yes sir.

97 Q. And the Uhlig No. 1 between the heavy blue?

A. Yes sir.

Q. And the Uhlig No. 2 between the heavy green lines?

A. Yes sir.

Q. From what data did you plat the Uhlig No. 1 and the Uhlig No. 2, including the respective areas in conflict?

A. From the official records in the surveyor general's office and my own ties to those claims.

Q. And the No You Don't—where did you get the data to plat that?

A. The same source.

Q. I find on this map what is ordinarily shown on maps as a ridge line——

Senator BROWN: I object to that statement, as to the ridge line.

Question withdrawn.

(Judge STREET:)

Q. I show you, running through the map towards the lower right hand corner an irregular line, running from the Uhlig No. 2, the area in conflict between the Uhlig No. 2 and the Yes You Do, through the Yes You Do, to the right of the discovery, up into the No. You Don't, and coming around through the No You Don't through the left hand corner of the Yes You Do, down through and almost parallel with the Uhlig No. 1, state what that is?

A. That is an etched line representing the outline of a rid-e.

Q. I show you on the Yes You Do claim a circle and some surrounding marks, with the word "Disc." What do those marks represent?

A. The "Disc." is the discovery, which is the discovery point of the Yes You Do.

Q. Is that where you placed your discovery notice?

98 A. Yes, sir; the one with the white space.

Q. I show you a round top with "Disc." on the Uhlig No. 1?

A. That is the discovery of the Uhlig No. 1, as surveyed for patent.

Q. As shown by the records in the surveyor general's office?

A. Yes sir; that is the official record.

Q. I show you on the lower part of the map an irregular line forking at the upper part, marked "St.'s Rest gulch."

A. That is Saint's Rest gulch.

Q. And the latters "Disc." on the Uhlig No. 2, what does that mean?

A. Discovery of the Uhlig No. 2 as shown by the official survey in the land office and in the surveyor general's office.

Judge STREET: We offer this map, in evidence. Any objections?

Mr. CRITCHLOW: For the purpose of illustrating the testimony of the witness, no.

(Map marked by reporter "Pl't'ff's Ex. No. 2. J. W. P.")

(Judge STREET:)

Q. I show you another map, and ask you whether you prepared this?

A. Yes sir.

Q. Does that map correspond to the location of the No You Don't——

Senator BROWN: We object to that. Ask him to explain it.

Judge STREET: I think I have the right to close my question before Mr. Brown objects.

Senator BROWN: Every question put on the other map was what certain lines meant.

The COURT: The attorney calling the witness has the right to put his question, and the attorneys on the other side, if they have objection, have the right to put their objection, and the court will pass on the question.

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Senator BROWN: We object to it on the ground that it is leading and attempting to pick out particular things on the map, instead of asking the witness to explain.

Judge STREET: I have the right to complete my question.

The COURT: You have that right.

(Judge STREET:)

Q. Does this map correspond as to the platted locations of the No You Don't, the Yes You Do, the Uhlig No. 1 and the Uhlig No. 2 with the map you have already testified to as Exhibit No. 2, and which you have said is correct?

A. Yes sir.

Senator BROWN: I have already stated my objection to it. I will make it now.

The COURT: He is asking him as to the correspondence of the surface lines of the same claims on the second map wit- those on the first map. I think he may answer the question.

Exception by counsel for defense.

(Judge STREET:)

Q. I find on this map—we will call this Exhibit No. 3 for the plaintiff—I find other claims and other marks than on Exhibit No. 2. I ask you to explain what those different marks are?

A. On the first, we had no Spring lode, No. 337.

Q. What is that?

A. It is a patented claim.

Q. State where you got the data to exhibit the Spring lode on this map?

A. From the official records in the office of the surveyor general.

Q. Is it correctly platted on that map?

A. Yes, sir.

Q. What others do you find?

A. The location corners—three of the location corners of
100 the Yes You Do are shown on this map, but not on the first map; also, there are improvements, which I have marked A, B. C. and D. That is all on this map and not on the others,—improvements at the points which I have marked A. B. C. and D., tunnels, excavations of some kind, that are not marked on the other map.

Q. How did you get the data for platting those excavations or improvements?

A. From a survey of my own.

Q. On the ground?

A. On the ground.

Q. I find something that is marked the Levi P. location?

A. Excuse me. There is one further point. On the first map I had another gulch which runs near to the northeast end of the Uhlig No. 2. I put it there simply by approximation. It might be 100 feet away, but I put it in by guess from the point marked No. 1. That doesn't appear on this claim. I believe that is the Revere gulch.

The COURT: When you refer to the maps, refer to one as Exhibit No. 3 and the other as Exhibit No. 2.

(Judge STREET:)

Q. I ask you what you have sketched on this map as the Levi P. location—on this Exhibit No. 3?

A. The brown boundaries are those of the Levi P. location and of the Veta location, on Exhibit No. 3, which do not appear on No. 2. I think that is everything.

Q. Where did you get your data to plat the Levi P. location and the Veta location?

A. From information furnished by Mr. Mayberry, the location notice, and points on the ground; I won't say corners.

Q. Have you platted the location of the Levi P. discovery?

A. Yes, sir; it is marked "Levi P. disc."—that little shaft which I have located with the instrument.

101 Q. Where did you get your data upon which to plat that?

A. As I stated, my own tie to the shaft, and information furnished by Mr. Mayberry.

Judge STREET: We offer Exhibit No. 3 in evidence.

The COURT: If there is no objection it will be received.

(Received in evidence without objection, and marked "Pl't'ff's Ex. No. 3—J. W. P.")

(Judge STREET:)

Q. Did you survey the Yes You Do before you platted it? Did you make the adverse survey in this matter?

A. Oh yes.

Q. I find that on the upper line of the Yes You Do, as platted on Exhibits 2 and 3, there is a bend or angle. Please state how that happens to be there?

A. The position of corner No. 2 of the Yes You Do is determined from that of the discovery. I thought when I located the discovery that we were about 300 feet from the side line of the No You Don't. The survey determined that we were more. We could only take 300 feet from the discovery, and that explains the way the corner comes the way it does.

Q. Do you know points that are called the fork of main Bingham canyon and Bear gulch?

A. Yes sir.

Q. In what direction does this claim, the Yes You Do claim, lie from the fork of main Bingham canyon and Bear gulch?

A. It would be southerly and easterly—southeasterly.

Q. Can you say at this time approximately, how far?

A. Between 1500 and 2000 feet; perhaps over 2000.

Q. Over 2000 feet.

A. From the discovery.

Q. At the time you made that location, did you, as nearly as possible——

Objected to as leading.

102 Question withdrawn.

Q. At the time you made your location, can you refresh your recollection ans state whether or not you estimated the distance between the fork of main Bingham canyon and Bear gulch and the Yes You Do claim?

A. Why, for good reason, I did not.

Q. I ask you to examine the copy of the notice of location which you have already testified to, and ask you whether the description you give with reference to the main Bingham fork, in the lower part of the notice, was as nearly correct at that time as you could make it?

Mr. CRITCHLOW: We object to that as a conclusion, until after we have examined him.

The COURT: He can state if he has estimated the distance from the Yes You Do claim to some natural object or permanent monument.

Senator BROWN: We don't object to that question; but this is another one.

The COURT: Is this a different notice from the Yes You Do?

Judge STREET: This is the Yes You Do notice.

Senator BROWN: The question is whether it is correctly described, according to the best he could do.

(Question last propounded read by reporter.)

Judge STREET: It is only offered as to the intent of this matter. I don't think it is very material myself.

The COURT: The witness would be entitled to answer as to that distance. Ask him the distance from the claim to this point.

Judge STREET: I will withdraw the question.

103 The COURT: You have the right to show it. The form of your question may not be proper, but he can answer the gist of it.

Judge STREET: I will withdraw the question.

(Judge STREET:)

Q. You have stated in answer to my questions that the distance might be 1500 or 2000 feet or more. I find in your location notice that you describe it as southeasterly 2600 feet from the fork. Have you any explanation to make with reference to the distance you have testified to and this location notice?

Senator BROWN: It seems to me he is assuming something; he is not properly presenting the question in this way; he can't at this time present it in that way. He had some good reason he says, for not estimating the distance. He either had the exact measurement, or he was shutting his eyes to it. Surely, this question does not tend to explain what the good reason was. I think it is improper.

The COURT: The court won't undertake to pass upon it as a bar or a good reason, for he does not know what it is. I think he may answer the question.

A. The last form of the question is it?

Exception by counsel for defense.

(Question last propounded read to witness by reporter.)

A. Yes sir; I would like to. I thought at the time of making the location that I was required to give some natural bearing object other than patent ties. Later I found that the patent tie was good enough; but in this case I gave both the patent tie and the tie to the fork. I have made surveys and maps of the neighborhood, and I took a map and I scaled the distance, as I remember; in fact, I am quite confident I scaled the distance and approximated the course. It was simply done to conform with my idea of what was required by a natural bearing object.

104 Judge STREET: With the privilege of recalling the witness after we take further evidence with respect to work upon the claim, we close his testimony at this time by offering the location notice of the Yes You Do claim. We think the location notice is competent to be admitted now, subject, of course, to anything th-t is brought out on cross-examination. A *prima facie* case is made to admit it.

Mr. CRITCHLOW: We ask to cross-examine him, just as we were proceeding to when Mr. Street resumed his examination.

The COURT: You can cross-examine.

Judge STREET: We take an exception.

Mr. CRITCHLOW: Note an exception.

The COURT: What are you excepting to?

Judge STREET: To the refusal of the court to admit the offered exhibit at this time.

The COURT: I didn't know that any objection was made. I thought Mr. Critchlow was going to examine the witness. If he has no objection it will be admitted.

Mr. CRITCHLOW: The testimony is in the position it was before. We objected to it, and said that we had the right to cross-examine him upon the notice before it was admitted, and we were proceeding to do so when your honor suggested that the witness had better go back to Judge Street. He again offers the notice now, and we again wish to examine him upon it.

The COURT: Without any cross-examination of the witness upon the objection made to the notice the court is of the opinion that unless the offer is made with the privilege to supplement the testimony of this witness upon the question of forfeiture, if you stand on that as well as abandonment, the court would sustain the objection, because the proof of forfeiture is not sufficient.

Judge STREET: Note an exception.

The COURT: You understand, Judge Street, that the ruling of the court is based upon the question of forfeiture.

Judge STREET: I understand, your honor, and we will reoffer the exhibit afterwards.

Cross examination.

By Mr. CRITCHLOW:

Q. How deep was the snow upon the ground on the 1st of January, 1898?

A. On the Saints Rest Gulch side, so far as I traversed it there was no snow at all. On the other side it was pretty deep. I don't think I got to the bottom of it.

Q. How deep was it then at the place you have marked on the map Exhibit No. 2 discovery of the Yes You Do?

A. My recollection is that there was none at all; there might have been a little. It was no inconvenience in going over. I don't think there was any snow.

Q. Did you at that time place a monument at the exact point where you now have run it?

A. Yes sir; I had to—I put my notice up on the board, and I didn't lay the board down. I found plenty of stones to do it. That is one reason that I am pretty dead sure. I remember now there was no snow on the portion of the outcrop from which I carried the rocks to fasten my stake. It was set in among the rocks.

Q. Then you didn't put your stake right on the outcrop?

A. Not on the bluff itself, but practically on it, within 30 or 40 or 50 feet of the actual edge of the bluff.

106 Q. Which way, north or south?

A. I went out on to the bluff, towards the main ridge, almost at right angles at the ridge. It would be practically north

Q. You put your stakes north of the bluff?

A. Practically on the bluff. There is, of course, a big shelf coming out. I put my stake in from the edge of the bluff where I could walk up on the soil to the place.

Q. Which way—north or south?

A. *North from the extreme edge of the bluff.*

Q. Did you know anything about the discovery of the Levi P. at that time?

A. I understood at that time that I was getting it just where the discovery of the Levi P. was. I thought I was.

Q. Did you see any shaft there?

A. I saw evidence of work there.

Q. Did you put it where you saw the evidence of work, this new location of yours?

A. Within—I can't remember exactly. I found the work there within less than ten feet away.

Q. Can you remember whether you put it right at the evidence of the work?

A. No, I wouldn't put it right on the work.

Q. What is the distance between what you have marked on the map Exhibit 2, as the discovery, and this other mark which lies to the northeast of that, which is evidently marked for a shaft?

A. That is the discovery of the Levi P., but I haven't got it marked on the map as such. It is about sixty feet away from that.

Q. That thing that you have got marked on Exhibit No. 2

107 just north of the discovery in the place where you saw the work?

A. No sir; I am very sure of that. I didn't go to the discovery of the Levi P. as I know it to exist.

Q. Did you take pains at the time you attempted to locate the Yes You Do to get the discovery down in this triangle here which is open?

A. No sir; I had got up in locating it within ten feet. Any where in that neighborhood was good enough for me. It just happened that it came there.

Q. Where did you place your corners on the Yes You Do. Or did you place any corners at all?

A. When I put my corners up I put them at the points I have indicated on the map.

Q. On the ground where did you put them?

A. At the points I have indicated in Exhibit No. 3.

Q. When did you do that?

A. Inside of 30 days.

Q. How much inside?

A. Before the end of January. I can't name the date.

Q. You put up the corners marked 2, 3, 4 5 and 1, did you?
A. No.
Q. What corners did you put up?
A. I put up the corners marked "L. C" and shown on the map as L. C.
Q. Which map?
A. On Exhibit 3.
Q. You didn't put the corners then at the places which are marked 2, 3, 4, 5 and 1 on Exhibit No. 2?
A. Not all of those corners—no sir.
Q. You did put them at other and different places which are marked on Exhibit No. 3?
A. Yes sir.
Q. And they are marked on Exhibit 3 in what manner?
A. As L. C., being the southeast corner, being situated
108 within the boundary of the Veta location, and below the ridge.
Q. How far? How many feet from corner No. 4 of the present survey of the Yes You Do is that situated?
A. 450 feet.
Q. 450 feet distant from the present corner of No. 4 of the Yes You Do?
A. Yes sir.
Q. Where did you put the next corner?
A. The next corner I put on the ridge practically, on the ridge near to corner No. 3 southwesterly a short distance from corner No. 3 of the Uhlig No. 1 as surveyed for patent.
Q. How many feet distant from corner No. 5 of the Yes You Do as at present surveyed?
A. About 200 feet.
Q. In a southwesterly direction?
A. Yes sir.
Q. How far is it from the first corner that you spoke of, to-wit, the southeast corner, as you say you located it, to the second corner, the southwesterly corner?
A. 1800 feet.
Q. Where did you put your next corner?
A. Well, I am not able to describe it now, but the other corner was identical with the corner 2 of the No You Don't, lot 99.
Q. You put it there because that was the corner stake of the No You Don't?
A. Yes sir.
Q. Did you know that the corner stake of the No You Don't was there?
A. Yes sir.
Q. Where did you put the next corner?
A. I set that as nearly as I could—in fact, I set it about at corner No. 3 of the No You Don't, lot 99.

Q. When first did you draw in the line between corners 1 and 3 so as to make this indentation.

A. At corner 2?

Q. Yes?

A. When I made the survey for protest and found that it had to be drawn in.

Q. It had to be drawn in?

A. Yes, sir; I don't remember the date. It was the day of making the survey for protest, though.

109 Q. Why didn't you continue the line 1 and 2 on its course?

A. Well, for the simple reason that I had described that corner as being identical with the corner of the No You Don't and because I wanted to hold my claim just as close to the No You Don't as I could possibly keep it.

Q. When was it you made this survey for protest?

A. I can give you the date, but I don't remember. It was on August 23rd, 1898, I believe. I made surveys there on August 23rd 1898. I did this when I had time. I think that is the survey I used for the protest. I will give that as the date.

Q. August 23 1898?

A. Yes sir.

Q. You were the owner of the claim at that time, were you, when you made this protest survey?

A. At the time when I tied to the corners I believe I was. I would like to explain if I can, without interrupting too much, that I made ties at different times when I had leisure; no one was paying me for that; and from those ties I composed the protest plat; so that it is quite likely that I still owned it when I made these surveys which I used later to get out my protest plat.

Q. What I want to know is, when it was that you drew in that line and made a corner No. 2 there, which you didn't have in your original location?

A. Well, it was when I made—it was in making the plat for protest when I drew it in. I never put a corner there.

Q. When did you make the plat for protest?

A. Well, I would have to look up some of the old Jordan books to find the date.

110 Q. Don't you remember when you caused it to be filed in the land office?

A. No, sir; I don't. Mr. Sonnedecker, I think, has the record He can give it to you.

Q. The statement in the pleadings in this case is—I will state for your information—the 24th day of August, 1898. Was that the time you made the protest plat, or prior to that time?

Judge STREET: That is the defendant's filing, not the plaintiff's

(Mr. CRITCHLOW:)

Q. Did you make the protest plat before the defendants filed their notice of application for patent in the land office, or afterwards?

A. Why, before they filed their application I had made surveys and tied up to my corners, and I did it, I believe, before the application was made.

Q. I am trying to find the time, when it was, if you can tell me, when you drew in this line and concluded that the line didn't run from 1 to 3 straight, but ran from 1 to 2 then from 2 to 3. If you are unable to give it, say so?

A. I would fix it that way. I originally thought, before I made my ties, that I held all the ground up to the No You Don't line, and I would try to represent it that way until I knew from a survey that it was wrong. It was summer time, and the day I made the last survey was August 23rd; it was between that time that I made surveys and plats at different times.

Q. And you drew it in?

A. Yes sir.

Q. Then it was on your own motion that you drew in that
111 line and made corner 2—or was it at the request of Mr. Lavagnino?

A. No; I had to do it. That is, I had to draw the line in, although I objected to it. Mr. Lavagnino didn't tell me to draw the line in.

Recess of court until 2 p. m.

2 O'CLOCK P. M.

J. FEWSON SMITH, JR., on the stand for further cross-examination.

By Mr. CRITCHLOW:

Q. At the point where you have marked upon the Yes You Do, lying right northerly of the place which you call your discovery, and which you said this morning was to represent the original location of the Levi P. State what kind of work was done at the time when you made this location on the 1st of January, 1898?

A. I couldn't state that there was any work done there.

Q. Did you do any work there?

A. Not there; below there.

Q. Is there any work there now?

A. Yes, sir.

Q. What?

A. A shaft of 4 or 5 feet deep.

Q. Mineral there at the shaft?

A. Yes sir.

Q. Is there a lode running through there?

A. Those works are done on the contact—not running the way you indicate.

Q. It is not running east and west?

A. Not at that particular point.

Q. It follows the ridge for some distance? Down here at this point you have marked discovery, is there a lode running along there?

A. It isn't a lode. It is the contact of the country.

Q. Are there two contacts—one at the place you call discovery here, and the other at the place you call the discovery of the Levi P.? 112

A. The contact is of considerable width there, that is in the porphyry, and those works are practically on the contact formation.

Q. You had heard of the existence of the Levi P.

A. Yes sir.

Q. And you knew where its corners were?

A. I knew from the description it was behind the No You Don't.

Q. Did you know where its discovery was?

A. Not until it was described.

Q. Did you find out where the discovery was at any time before you located the Yes You Do?

A. I was told by Mr. Mayberry that it was behind the permanent dump, which I could find in the dark.

Q You say there was evidence of work there?

A. No, the evidence of work was on a litle flat on top of the bluff. This shaft is on the slope some distance from that. I didn't see that shaft the night I made the location.

Q. Isn't it a fact that you intended to relocate the Levi P.?

A. Yes, sir; as nearly as I could.

Q. Of course, you went to the point where you supposed the discovery was and made your relocation there?

A. Close to it, I wasn't particular to 50 feet or 25 feet.

Q. Were you particular to find any evidences of mineral that night?

A. No sir.

Q. You didn't try for that?

A. No sir.

Q. You have some interest in this litigation, have you not?

A. I have no interest in the litigation—no, sir.

Q. You have no interest in the litigation?

A. I think I can say that. I have, and I have not.

Q. What do you mean by that?

A. When Mr. Lavagnino undertook to buy the claim, there was a possibility of having litigation, and we would have to, of course, stand the expense—somebody would have to stand the expense of the litigation, if there was any; and since I couldn't make a sale to Mr. Lavagnino out and out, I just let him take at his own terms, with the understanding that if the claim was given to him clear—that is, if there was no litigation from any source, and he got the claim through for patent clear, then I was to receive, in addition to what I got that day, a certain sum of money. 113

Q. When did you make this arrangement with Mr. Lavagnino?

A. I didn't keep track of that very closely. It was right after, I remember, some arrangement with Dr. Hasbrouck.

Q. State the fact when it was?

A. In 1898, between the time of entering the protest and the time of making the location.

Q. It was between January 1st and the time you entered the protest?

A. Oh yes; it would be somewhere about the middle of the summer, I should think.

Q. Along about June or July?

A. That I first spoke to him about it, and he didn't care to take any interest in it.

Q. Along about June or July, would you think?

A. It might be; it was summer time; it might have been.

Q. Did you receive anything from Mr. Lavagnino, at all?

A. Yes sir.

Q. How much did you receive?

A. One dollar in cash.

Q. That was simply to bind the bargain?

A. That was to bind the bargain.

Q. But the consideration, however, is to be received by you or not to be received by you, dependent upon the result of this litigation?

114 A. If he doesn't get the ground, we get nothing further.

Q. So that the interest which you have in the case is just exactly as though you were the owner of the ground, isn't it?

A. Well, we couldn't get a cent out of it now. I don't feel that I will get a cent out of it now, the way it has gone.

Q. You don't think you will?

A. I am afraid I won't. That will depend upon his liberality.

Q. You mean you don't think you will get any ground, and therefore you don't think you will get anything out of it?

A. No, sir; not by any means. When I transferred the ground to Mr. Lavagnino it was for the purpose of defeating these other claims, and not with a view of making much.

Q. Your idea was——

A. (Continuing:) of the amount we were to receive. Mr. Mayberry — that he knew of no location there that would inte-fere I felt that it would be no trespass, and I said, "If we don't get the ground and can't give you the ground, you can take out the expenses of the suit and we will get nothing."

Q. Did you have an agreement in writing with Mr. Lavagnino?

A. I think I submitted my terms. There was no agreement drawn up between us except a verbal agreement, but I made an offer to Mr. Lavagnino by letter, I think; in fact I am sure I did.

Q. Isn't there in existence a written contract between you and Mr. Lavagnino?

A. No sir.

Q. Or a written agreement of some kind setting forth the bargain between you?

A. No. There's this written transfer made by me to Mr. Lavagnino, but there is no agreement that is binding on each other.

115 Q. Did he accept it in writing?

A. No, he told me he didn't care to take any interest in the property when I made the written offer. He objected to having any interest in the property.

Q. You didn't want to go ahead and make this protest yourself, did you?

A. I didn't have any money to protest, and I couldn't.

Q. Isn't it a fact that you being a deputy United States mineral surveyor, couldn't make the survey and protest for your claim if you held it in your own name, and you consequently turned it over to Mr. Lavagnino?

A. It is a fact I couldn't make the protest in my own name while I held an interest in the claim.

Q. The interest that you now have in the claim is that you have received one dollar to bind the bargain, and the balance of the purchase price is to be received at the end of the litigation?

A. There is no agreement that will give me anything now.

Q. At the end of the litigation, if ever, you are to receive pay for the ground. Isn't that true?

A. If there had been no litigation I would have received a certain sum of money.

Q. No, no. If you are ever to get any payment at all, it must be at the end of the litigation. Isn't that true?

A. No sir; that isn't the way. It wouldn't be right to state it that way.

Q. Have you got a copy of that letter?

A. I believe Mr. Lavagnino has got the letter. He isn't here just now. Can I make a little statement.

Q. You can do that on re-direct. I want to ask particularly about this thing. Was your agreement with Lavagnino upon a basis of so much per acre for the ground, that you were to get out of it?

A. No sir.

116 Q. It was for the whole claim?

A. It was to sell him the claim without any litigation. If he had litigation then he could take care of himself, and we had nothing.

Q. Is that the way the letter reads?

A. No, sir; that is the spirit of the agreement.

Q. That is the spirit you have.

A. Well, it is the agreement unfortunately; that is, verbally.

Mr. CRITCHLOW: Have you the letter Mr. Lavagnino, written to you by Mr. Smith with reference to the offer he made?

Mr. LAVAGNINO: I haven't got it here. I will look for it this

evening. I made an attempt to find all the papers I have got, and except what I have got here I didn't find anything else.

(Mr. CRITCHLOW:)

Q. Did you actually receive one dollar?

A. I insisted upon Mr. Lavagnino giving me one dollar, for I had to go down next day, and I didn't have a dollar to pay fare out.

Q. Did you give it back to him?

A. No sir.

Q. In whose employ were you on the 1st of January, 1898?

A. I was in the employ of Allen G. Lamson.

Q. Do you know what Mr. Mayberry was at that time?

A. Yes sir.

Q. What was he?

A. Foreman for the Old Jordan and Galena Mining Company.

Q. Was he at that time with the United States Mining Company?

A. No sir.

Q. The Old Jordan and Galena. Were you also employed by the Old Jordan and Galena?

A. Yes sir; I was doing their surveying.

Q. You and Mr. Mayberry were very friendly?

A. Sometimes. Not so very friendly about that time.

117 Q. What interest has Mr. Mayberry in this claim?

A. No interest at all.

Q. When you located that ground did you jump the ground of Mayberry, or did you locate it for him in part or in whole?

A. Mr. Mayberry wasn't considered—no interest in any way; and I simply located on the ground; I didn't jump the ground. It was vacant.

Q. You still considered that Mayberry had an interest with you in the ground when it was sold to Lavagnino?

A. No sir.

Q. Hasn't he now the same interest that you have?

A. No sir.

Q. You promised to pay Mr. Mayberry something, if you get it out of this litigation?

A. No sir; only for his services.

Q. What services?

A. His services in coming here to testify. That is, I haven't promised to pay him anything. That is for Mr. Lavagnino.

Q. You speak of this as your claim and your litigation, don't you. You are interested in it?

A. Why in the sense that you mean, I am not interested in it.

Q. Have no interest whatever?

A. I have no interest in it, only to see the case won, that is all. I feel interested enough to see the case won.

Q. What did you mean a little while ago when you said you wanted to knock out or defeat these other locations?

A. Well, I had been dickering with them, and they deceived me

in regard to this $50 worth of work, and at the last moment when the work should have been done—it was promised to be done it wasn't done, and they promised to give me a bond and lease of the property, or at least, I promised to give them, and they were to do the $50 worth of work, and it went on to within a few days
118 of the time, and I got a suspicion that they wanted the ground to go by default and possibly locate it. So I sent out men to do the work; and then I went to Mr. Hasbrouck.

Q. What did you mean when you said you were interested, or that your interest was in having Lavagnino try to knock out these other locations?

A. I had no love for the other locations or their possessors.

Q. You mean the Uhlig 1 and 2?

A. Yes sir.

Q. You had been assured by Mr. Mayberry that there was no such locations as the Uhlig 1 and 2?

A. No, Mr. Mayberry said there were two locations back there that he was going to abandon.

Q. Didn't you say a moment ago that Mayberry told you that this ground was clear?

A. He told me, gave me to understand, that was a full claim in there, and he didn't think there were any claims in conflict with it.

Q. When you found out as a matter of fact, the Uhlig No. 1 and the Uhlig No. 2 are here in conflict with this, then your ambition is to knock them out in some way?

A. When I found out what I have told you, my ambition was to knock them out.

Q. You didn't intend to conflict with the Uhlig No. 1 and the Uhlig No. 2 when you located the Yes You Do, but you thought there was a full claim which might be located on vacant ground?

A. I thought those two claims—in fact, I didn't think about it. When I began to investigate I thought they were farther away.

Q. When you found that the Uhlig No. 1 and the Uhlig No. 2 were here, why did you deed all this conflict area to Lavagnino and tell him that you wanted to knock them out?

A. I didn't tell him that. The reason that I deeded him that ground in conflict was that I didn't believe that ground could
119 be held by them, or belonged to them.

Q. Did you think it was located after the Yes You Do?

A. No, sir.

Q. You knew it was located before that?

Judge STREET: I desire to object to it as not proper cross-examination, for the reason that this whole subject-matter now being examined into, if admissible at all in cross-examination, would be admissible to show some interest of the witness in the result of the controversy. It does not relate to the validity of the Yes You Do location, but pertains to a time subsequent to the location of that claim.

The COURT: I suppose he is trying to disclose his interest and his bias, if any.

Judge STREET: I think it has gone to the extreme, if that is the object.

(Mr. CRITCHLOW:)

Q. When you located this, did you intend or expect to cover ground belonging to the Uhlig No. 1 and the Uhlig No. 2?

A. No sir; I didn't expect that I was doing it.

Q. When you came to deed to Mr. Lavagnino, did you know that the Yes You Do covered the Uhlig No. 1 and the Uhlig No. 2 in part?

A. Yes sir.

Q. Why did you deed to Mr. Lavagnino that part of the Yes You Do location which covers the Uhlig No. 1 and the Uhlig No. 2, if you didn't intend to locate that ground?

A. Well, I can't hardly answer that. When I made my location I thought the location was clear. When it turned out that they claimed to be there, I still felt that I was entitled to the ground.

120 —. Why?

A. The location notices were a little mixed, and from the statements made to me by Mr. Mayberry.

Q. It was on account of Mayberry telling you that there was room for a full claim in there?

A. He told me he had a full claim in there, and he described to me some of the other posts and conditions which I considered in making the location.

Q. You found Mayberry was mistaken in saying that he had a full claim in there?

A. No, sir; I don't think I did.

Q. Did you attempt to mark the Levi P. claim on here?

A. Yes, sir.

Q. Did you find that he had room for a full location in there between the Uhlig No. 1 and the Uhlig No. 2 and the No You Don't?

A. If you force me to recognize those other surveys, I would say he had not room for the claim; but I didn't recognize them.

Q. You don't recognize them?

A. No, sir.

Q. How much in all were you to get for the Yes You Do location from Mr. Lavagnino?

Judge STREET: We object to that as immaterial and irrelevant.

Mr. CRITCHLOW: We desire to show his interest.

The COURT: They haven't offered the deed in evidence, and as the deed is not in evidence and before the court, I don't think at the present time the question is proper. The plaintiff withdrew the offer of the deed.

Judge STREET: We expect to offer it.

The COURT: I think it would be more proper when the deed is received in evidence, if at all.

Mr. CRITCHLOW: We think we have a right to press the question for the reason that the witness gave it merely as his conclu-
121 sion that he doesn't think there would be anything coming to him. We would like to have the basis upon which he draws this conclusion. It may be entirely erroneous as soon as the amount is stated.

The COURT: The court has stated that he would give you a wide range of cross-examination with a view of affecting or testing his prejudice or bias in relation to this matter—to test the credibility of his evidence. But this matter wasn't called out in chief. You may ask him however.

Exception by counsel for plaintiff.

(Mr. CRITCHLOW:)

Q. What was the full amount you were to receive at the end of the litigation?

A. The arrangement is to give Mr. Lavagnino the ground patented, he to pay all the expenses of patenting out of $600 and I was to get the difference.

Q. So that, if he could get any part of the ground of the Yes You Do location, no matter how much, and the expense of patenting it should not go to $600, you would get the overplus?

A. No, sir; not now.

Q. You said that was the bargain?

A. In this letter that was the bargain.

Q. Is that the arrangement between you?

A. It became evident that the property was going to be protested. Mr. Lavagnino made objections. I says, "Go ahead, and we will take the expenses out so far as that $600 goes. Those expenses will be taken out.

Q. So that the bargain remains just as it was?

A. No, sir; it stopped the sale then, and the agreement was then that he should go ahead and still take out such expenses, even if they ran up to $600.

Q. So, if I understand you correctly, the bargain between you was this—you deeded over to him the Yes You Do, and you received $1. For the rest of your consideration you were to receive such
122 an amount, $600, less the expense *pf* patenting and the expense of the litigation?

A. Well the patent was the first consideration. The litigation was a subsequent event, not expected.

Q. Well, I ask you——

A. (Interrupting.) Well, that is right.

Q. So that if the expense of the patent and the litigation should amount to only $400 you would get $200?

A. Yes sir.

Q. And even though you succeed in retaining only this little triangle where you put your discovery?

A. If the claim goes through to patent he might object to that.

Q. If the claim went through to patent, and you got this little white triangle where you placed your discovery, and the expense of patenting and litigation was only $400, you would get $200 from Mr. Lavagnino, wouldn't you?

A. I can't answer that. The thing is rather uncertain. I think we can hold Lavagnino to pay us the total difference. But we have done so much talking over this thing that I can't state what I said, and what we have agreed to and what we haven't.

Q. If the expense exceeds $600, is Mr. Lavagnino to deed it back to you?

A. No sir; not much.

Q. Or if you pay the expenses, he would deed it back to you?

A. No, sir; no such thought was ever spoken of.

Q. You spoke about his deeding it back to "us," and "we" having an arrangement. Who is "we" in this matter?

A. I very seldom speak personally in any matter.

Q. Who did "we" and "us" mean in this thing?

A. I associated myself with Mr. Lavagnino in this case.

123 Q. You said "we" made this arrangement, and Lavagnino wasn't to deed it back to you?

A. Well, I referred to Lavagnino every time. I never said mine. I very seldom refer to anything as mine.

Re-direct examination.

By Judge STREET:

Q. Had you been on the ground covered by the Yes You Do previous to the time you located it in January 1st, 1898?

A. Over a portion of it.

Q. Had you been along the contact that you speak of?

A. I have been very near to it, along the ridge.

Q. Had you seen this prominent bluff?

A. Yes sir; I think I had. That is, I passed along the ridge. I can't state that I noticed at any time any particular point on it, previous to making the location.

Q. After you located it did you examine it?

A. Yes sir.

Q. What is the nature of the contact?

A. There's a contact between quartzite and porphyry.

Q. Is that related to other contacts, in your opinion, in the neighborhood.

A. It is the contact which carries the Telegraph and Jordan veins. That is, we assume it to be that.

Judge STREET: We will now offer our notice of location.

Mr. CRITCHLOW: We object to this notice of location: First be-

cause it is incompetent, for the reason that it purports upon its face to be a relocation of a mining claim which, according to the testimony of the witness and the statement of the location certificate itself, was a mining claim which was in existence prior to the time of this location, presumably a valid and subsisting mining claim, and for that reason the ground wouldn't be subject to location.

124 Secondly, because the location certificate is not upon its face sufficiently definite to fix the locus of the ground with reference to any natural object or permanent monument, as required by the act of Congress. In the third place, because it is incompetent, as well as being immaterial and irrelevant, for the reason that by the testimony of the witness it appears that it was not located by a person who had the power, under the act of Congress, to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned January 1st, 1898, a deputy United States mineral surveyor for Utah, and therefore incompetent to make locations. In the fourth place, we object to it in this particular action for the reason that it now appears that the witness, at the time when the protest map and plat were made and the survey made by the surveyor for the purpose of fixing the boundaries for the purpose of an adverse claim and protest, the witness, who made that survey and made that plat which was introduced in the land office, was himself a deputy United States mineral surveyor, interested in the action, as he himself has stated, namely, interested in the title to the claim.

Objections argued at length by respective counsel.

Judge STREET: I desire to offer in this connection the deed from J. Fewson Smith, Jr., to Mr. Lavagnino, the plaintiff in this case, stamped with a $1 United States revenue stamp.

Mr. CRITCHLOW: We object to it for the same reasons heretofore given, namely, that there has been no proof, and can be no proof of a valid location of the mining claim under the act of Congress, section 452, and therefore there is nothing whatever to act upon, a being null, it can't be made good by any subsequent act of

125 the party; and for the further——

Senator BROWN: Let us take a ruling on this first.

(Motion as made by Mr. Critchlow read to the court.)

Senator BROWN: We will repeat that objection. We make all the objections to the deed that we did to the certificate of location.

The COURT: They offer them now in one offer. I desire to give the plaintiff a fair opportunity to test this question. My impressions are against him.

Senator BROWN: I want to make the same objection, so as to keep the record straight—I want therefore to make the same objection, and if your honor will allow me, to put one objection a little different. I want to add this: That it appearing affirmatively that this location, when made, was made by a deputy mineral surveyor who was prohibited by law from making it, therefore the location itself was in violation of the law, and couldn't be made a basis of any-

thing to transfer, either the basis of a valid location in himself, or any basis to deed to anybody.

The COURT: The court will sustain the objection to the offer in evidence of the location certificate, that is to say, the certified copy of the location notice, and the deed in connection with it, upon the third ground specified, and the additional fifth ground, I think it would be called—the one made by Senator Brown—because under the law J. Fewson Smith, Jr., the locator of the claim, was prohibited from making the location of a lode mining claim, and therefore had not the qualifications to initiate any title by any act that he did with reference to locating the Yes You Do mining claim.

126 Judge STREET: I understand the objection is sustained, and the location certificate and the deed are excluded?

The COURT: Yes, on the grounds I have stated. I do not pass upon the other points.

Judge STREET: I desire, also, that the record show that the objection was sustained upon the construction of section 4452 of the Revised Statutes of the United States, together with the general mineral act of the United States, section 2319.

The COURT: The court, in the construction of these two sections, holds that section 452 qualifies the section 2319, to the extent that—as construed by the court—it would be prohibited as a matter of public policy, that is, the right of J. Fewson Smith to make this location.

Judge STREET: We wish the record at this time to show that the construction of a Federal statute was involved in the ruling of the court.

The COURT: The court desires to place the matter fairly upon that construction.

Judge STREET: Yes; that is what I understand.

The COURT: I do this with some reluctance. I would like to see the case tried. I believe, however, upon a full consideration and construction of these two statutes, the court is bound to hold the location notice invalid.

Judge STREET (to opposing counsel): Will you now admit the allegation of the complaint with respect to the filing of the protest and adverse claims by Mr. Lavagnino within the time prescribed by law?

Senator BROWN: We don't want to admit that. But we will do what will have the same effect for you. We will admit that
127 you offer to show it, and that we object to it, because in *its* connection with the proof it would be immaterial. That implies, for the purposes of review, that you have proven it.

Judge STREET: In order to get the record straight, we offer to show in this case at this time, first, that within the time prescribed by the Federal statute, the plaintiff filed in the United States land office a proper protest and adverse claim with respect to the area in conflict between the Uhlig No. 1 Lode mining claim and the Uhlig

No. 2 Lode mining claim and the Yes You Do mining claim, and that within thirty days of the time of filing the protest and adverse claim, the plaintiff commenced this action in this court to determine the right of possession of the area in conflict between the said claims. We also offer to show that at the time the Yes You Do Lode mining claim was located, or, I should say, at the time the Uhlig No. 1 and the Uhlig No. 2 mining claims were located, that there was a subsisting, valid location known as the Levi P. location, and also a further subsisting valid location known as the Veta location, as displayed on Exhibit No. 3, and that the Levi P. location covered all of the area in conflict between the Yes You Do and the Uhlig No. 1 and the Uhlig No. 2 claims, and that the necessary labor required by the United States statute for the Levi P. claim was performed up to and including the year 1896, and that in the year 1897, previous to the location of the Yes You Do, the owner of the Levi P. claim abandoned all rights to that claim, and also performed no annual labor or improvements upon that claim for the year 1897; and also that the Veta Lode mining claim was located in the same year as the Uhlig No. 1 and the Uhlig No. 2, and antecedent thereto, antecedent in point of time, to the Uhlig No. 1 and the Uhlig No. 2, and covered the discoveries
128 of each of said claims, the Uhlig No. 1 and the Uhlig No. 2.

We also offer to show that we have performed the annual labor and improvements required by law upon the Yes You Do mining claim for the years 1899 and 1900—that Mr. Lavagnino, the plaintiff, has performed the annual labor. And we also offer to prove that at the time, and for some time antecedent to the time that the protest and adverse claim were filed by the plaintiff in this action in the United States land office, that the title had passed from J. Fewson Smith, Jr., to the Yes You Do, to G. Lavagnino, the plaintiff in this action. We also wish to prove that the certified copy of the location notice offered was recorded January 3rd, 1898, at 10:21 a. m. at the request of J. Fewson Smith, Jr., in the office of J. C. Jensen, county recorder of Salt Lake county, and is recorded in or described in Book G of Mining Abstracts, page 191, and that the plaintiff and his grantor have, during the time since the location of this claim complied with all the laws, rules and regulations of the United States and of the State of Utah, and of the West Mountain mining district, to entitle them to the possession of the Yes You Do Lode mining claim, including the conflict area between the Uhlig No. 1 and the Uhlig No. 2 claims.

Senator BROWN: To all of these various offers we have various objections. To the evidence of the record of the notice of location, we say that it is immaterial, because the record itself being void its recording would be immaterial. To the offer to prove that the work was done upon this claim, the Yes You Do, we object that it is immaterial, because the location not having been a legal one, it is immaterial whether he did any work or not. To the offer to show

the filing of the adverse claim within the sixty days' period of
129 publication, and the commencing of the suit within thirty days thereafter, I object that that is immaterial for the same reason; it would be material in a valid location only. In other words, all that falls within the ruling that has already been made. There was another offer which, it strikes me, stands upon an entirely different plane—nothing to do with it. Still, I make these objections to these things, and I think I have covered now all connected with the plaintiff's case. If not, I object to the other things. There was an offer to prove something about the existence of two mining claims known as the Levi P. and the Veta, and perhaps another one—those two, at any rate. As to those claims, it rests on an entirely different foundation. We understand that it is our duty to go on and prove title to the Uhligs now, or at least after the plaintiff shall have rested. If these gentlemen desire in advance, without waiting, to rebut or attempt to prove that the Uhligs must necessarily have been illegal claims, the Uhligs and the Mute, I think we will not object. It wouldn't be any part of their claim, and I only object to it as no part of theirs. But if they see fit to begin to rebut the possibility of the legality of ours, we don't care; we are willing they should do it.

The COURT: That might bring the whole case up for determination by the supreme court. Of course, there would be some advantage in that way, in having the case fully determined on the evidence.

Senator BROWN: I take it they couldn't make it any stronger than their offer. They go up with it just as they have proven it. It is simply as to the Veta and the other fellow.

130 The COURT: Of course, the court will permit the question to be litigated, if it is desirable, in order to have the facts go up before the supreme court of the State. It is a very important question, and one not altogether free from doubt. I am trying to get at it the best I know how; and if all the facts are gone into in the case, then the supreme court, in passing upon the facts, if they are there, can make some direction to the court below if they should overrule the position I have taken. It might avoid a retrial of the action. Of course, if they sustain the position I have taken, that would end it, so far as the title to the Yes You Do is concerned.

Judge STREET: I will segregate my offer, and offer all the other matter except the matter relating to the Levi P. and the Veta first.

Senator BROWN: To that I object, to the whole of it. It is immaterial. The foundation having fallen, and there being no location at all, they must go with it; and for the same reasons contained in the objections already made to their location.

The COURT: As to the proceedings in the land office, in so far as the claim of the plaintiff to the Yes You Do is concerned, the court having held that the location was void, having held that the locator, J. Fewson Smith, was not authorized, but prohibited by *by* the law for making the location, and that the filing of the adverse claim

by him in the land office would be invalid, the objection to that offer will be sustained.

Exception by counsel for plaintiff.

Judge STREET: I was just going to say that, in view of some doubt among the profession as to the standing and rights of the
131 attorneys for a plaintiff whose location is decided to *to* be void, I am somewhat at a loss whether to simply *to* rely upon presenting to the court, as if we were still interested in this litigation as perhaps friends of the United States Government, the matter respecting the Levi P. and the Veta, or whether to offer now the subject matter respecting the Levi P. and the Veta which I have heretofore outlined to the court; and in view of the uncertainty with respect to the position of counsel in this case, the plaintiff having been found to have no standing before this court at all, and the situation having been presented to the court, upon which the court finds that he never had any status, I think that I will repeat my offer, with your honor's permission.

Senator BROWN: We will let you go on if you want to prove the Levi P. We may raise objections as it goes along. But to the general offer, that you are going to prove the Levi P. to be a good location, we have no objection.

The COURT: What have you gentlemen to say as to whether in proceeding upon this point, the burden is shifted to the defendant, the application for patent, as to the Uhlig claims.

Senator BROWN: I have already stated that I thought the proper way was for us to take the burden.

Judge STREET: The question I raise is whether we have any standing or not?

The COURT: The court feels inclined to give you the right to rebut it, or take the initiative.

Judge STREET: I would like to raise this question fairly, and I am trying to devise a way.

We will rest.

132 LAYFAYETTE G. BURTON, sworn for the defense.

Judge STREET: I wish to withdraw my rest to make one further offer, which I understand to be the fact, that is, to prove that the entire interest of Mr. McKernan, as well as Edmund H. Uhlig, both of the original defendants in the case at bar, has passed to the St. Joe Mining Company, which has appeared in this case and been made a party here.

Senator BROWN: Go ahead and prove it.

(Certified copy of location certificate and deed heretofore offered in evidence and excluded by the court, marked for identification by the reporter with the initials "J. W. P.—Z and Y" respectively.)

Dr. R. HASBROUCK, sworn for the plaintiff.

Examined by Judge STREET:

Q. What position do you occupy with respect to the St. Joe Mining Company?

A. President.

Q. Are you familiar with the transactions of the company with Edmund H. Uhlig and Alexander McKernan?

A. Yes sir.

Q. Has the interest of Mr. Uhlig been transferred to the St. Joe Mining Company?

A. Yes sir.

Q. Has the interest of the other one, Alexander McKernan, in the Uhlig No. 1 and No. 2 claims been transferred to the St. Joe Mining Company?

A. No.

Q. Has the St. Joe Mining Company paid the purchase price for that interest?

Objected to as incompetent.

Judge STREET: We desire to show that the actual title has
133 been made to the St. Joe Mining Company, and that it is the actual party in interest here.

The COURT: I don't know what the objection is just yet.

Senator BROWN: We object to it as immaterial in this action of title to determine whether any consideration was paid by this company, the St. Joe Mining Company, to one of the locators, McKernan. It is entirely immaterial in this action. If it were an action in equity for specific performance by this company against McKernan, that would be different; but in this action it is entirely immaterial.

Judge STREET: It relates to a technical point made by Mr. Critchlow in the inception of the case, that is, that this action had been dismissed as to Mr. McKernan. The St. Joe Company has appeared in this case, and when once they appear that appear for all purposes, and we wish to show that they are an equitable owner; that Mr. McKernan is dead; that they paid the entire purchase price and are entitled to a deed, and that their appearing in this action would reinstate them for all purposes, if there is anything in Mr. Critchlow's point.

The COURT: I understand that this suit was commenced against Uhlig and McKernan.

Judge STREET: Through an alleged defect in the summons Judge Hiles dismissed it as to McKernan.

The COURT: Because more than three months had elapsed since the suit was commenced and no summons had been issued?

Mr. SONNEDECKER: Because the summons was not returned by the sheriff in time.

Mr. CASEY: I think the summons was attempted to be served
134 on Mr. McKernan, but it didn't contain the name of Mr. McKernan at all, and the court held that no service whatever was made upon Mr. McKernan and the summons was quashed. The order reads that the summons was quashed and the complaint dismissed entirely as to Mr. McKernan. There has been no appearance since as to Mr. McKernan.

The COURT: Is the St. Joe Mining Company substituted for either one of these parties defendant?

Mr. CASEY: Only as to Mr. Uhlig.

Judge STREET: My point is, when they are shown to be the owners, their substitution brings them in for all purposes to the extent of their interests.

The COURT: He may answer the question. I will overrule the objection.

Exception by counsel for defense

(Question last propounded read to witness.)

A. No, sir.

Q. Has the St. Joe Mining Company a contract with respect to the McKernan interest?

A. A deed in escrow.

Q. Have they made payment upon it?

A. There was—for one-eighth we have the receipt of the administrator—for a one-eighth of the one-third that Mr. McKernan held in the property.

Q. Have you a contract with respect to the remainder of the McKernan interest?

A. The deed in escrow is the only contract.

Q. Have you made all the payments that the escrow agreement calls for?

Objected to as immaterial, and for the reasons already stated.

Objection overruled.

Exception by counsel for the defense.

135 A. I stated that we had paid one-eighth of the one-third interest that McKernan held in the property that we got from them.

Q. One-eighth of the purchase price for the one-third?

A. We have paid one-eighth of one-third of the price that was to be paid.

Q. Have you the escrow agreement or a copy of it?

A. That is in the bank.

Q. Have you a copy of it?

A. No sir.

Q. Can you produce to-morrow morning a copy of it, which you can identify as a correct copy of it; or will you tell me what bank it is in, so as to authorize us to subpoena the bank to bring in the agreement?

A. It could be done.
Q. What bank is it in?
A. In the National Bank of the Republic, I believe.
Q. Couldn't you furnish a copy that your counsel would admit was the agreement?
A. I can, if it is desirable.

Senator BROWN: If we can get one, we will get one for you; if we can't, we'll tell you so.
Judge STREET: Then, with the proviso that if the agreement amounts to a sale of this property, a vendor and vendee contract, instead of a mere option, we desire to introduce it, and as of the time before resting, I think we will rest now.
The COURT: Your rest may be considered withdrawn for that purpose.

(Plaintiff rests.)

136 LA FAYETTE G. BURTON, heretofore sworn, called for the defendants.

Examination by Mr. CRITCHLOW:

Q. Your name is L. G. Burton?
A. Yes sir.
Q. You are a deputy United States mineral surveyor?
A. Yes sir.
Q. And you have been for many years?
A. I have.
Q. Did you survey the Uhlig No. 1 and Uhlig No. 2 mining claims lode mining claims, in the West Mountain mining district?
A. Yes sir.
Q. Have you prepared a map showing your survey of those two claims?
A. Yes.
Q. And showing, also, the relation between those claims and certain adjoining claims known as the Spring and the St. Joe No. 1 Lode mining claim?
A. Yes sir.
Q. Also showing their topographical features?
A. Yes sir.
Q. Explain what the topographical features are that you have on your map there. Or do they explain themselves?
A. They explain themselves.
Q. I notice, also, something that seems to indicate work upon these claims. Were those from actual surveys made by you?
A. Yes sir.
Q. Indicating tunnels from the surface of the ground?
A. Yes sir.

Q. Calling your attention first to the Uhlig No. 1 Lode mining claim—that is patent survey No. 3683?

A. Yes sir.

Q. At what date did you make that survey?

A. I commenced the survey May 12, 1898.

Q. I note that you marked upon the map corners 1, 2, 3, and 4. Did you at the time you surveyed the claims for patent at the date mentioned, May 1898, find location corner stakes?

A. Yes sir.

137 Q. Won't you explain where you found the corner stakes of the Uhlig No. 1 location at the time you made this survey, and state whether or not they are indicated upon the map?

A. Corner No. 1 is identical with the northeast location corner of the claim.

Q. What did you find at that corner?

A. A 2 x 4 post marked in pencil. This is a mound of stones at this point.

Q. Proceed to the location of stake No. 2?

A. I don't remember what I found there. I don't remember the description of the corner, but it is marked location corner in my notes.

Q. Are you able to state whether there was a mark on that corner of some sort or other?

A. My memory is that there was, but I can't tell positively, because I haven't a note of it. I have simply got "location corner."

Q. That location corner was of what location?

A. Of the Uhlig No. 1.

Q. Proceed to corner No. 3 You established a corner there in your patent survey?

A. Yes sir.

Q. How did that correspond with the location corner?

A. Identical, and was an oak stake, two inches in diameter.

Q. Proceed to patent corner No. 4. Did you find the location corner for that?

A. The location corner was south 72 degrees 46 minutes west, 119.5/10 feet from where I placed the patent corner.

Q. So you had to draw in the patent line?

A. Yes sir; that was a stake in a mound of stones.

Q. Marked how?

A. Marked location corner of the Uhlig No. 1.

138 Q. Did you also at that time find a discovery point or monument within the boundaries of the Uhlig No. 1?

A. Yes sir.

Q. Where did you find that?

A. At the north end of an open cut. That was a post in a mound of stones.

Q. How was it marked?

A. It was marked "Discovery of Uhlig No. 1" I don't remember whether the notice was there or not.

Q. Did you take a bearing and the distance from any corner of the Spring patented claim, No. 337?

A. Yes, sir.

Q. Won't you give me that bearing, either by measurement or scale, as near as you can?

A. Well, I made a direct measurement from that post through to the corner of the Spring.

Q. I don't care about the exact measurement. Give me the measurement as nearly as you can state it upon that map of the distance between the discover- of the Uhlig No. 1 and the northwest corner, being corner No. 3 of the Spring?

A. Southeast of it 580 feet.

Q. Did you put the Spring lode upon this map from actual measurement, or by calculations.

A. From actual measurements, taken from post 2 of the Uhlig No. 1 and post 3 of the Spring.

Q. Do you know the hill situate in the West Mountain mining district known as the Telegraph hill?

A. Yes sir.

Q. State whether this Uhlig No. 1 is on the side or slope of that hill?

A. The west end of the Uhlig No. 1 comes on to the ridge and about 100 feet past the ridge, between the Telegraph mine and the Saints' Rest gulch.

130 Q. Assuming that this is a part of Telegraph hill, on what slope would it be?

A. It would be the westerly slope—slope to the west from here (indicating)

Q. But the main body of the Uhlig No. 1, which slope would that be on?

A. It would be on the east slope, sloping from the ridge to the east.

Q. Was the crest of the ridge along here, or is it up here (indicating same to witness)

A. Here is the crest of the ridge along here (indicating same)

Q. As it runs through the No You Don't claim, which way does the crest of the ridge run?

A. It runs northeasterly and southwesterly.

Q. So the slope would be to the southeasterly?

A. Yes, sir.

Q. As defined from the northwesterly slope?

A. Yes, sir.

Q. Won't you give me by scale the distance from the discovery point to the easterly or southeasterly end line of the Uhlig No. 1.

A. It is 51.8/10ths feet.

Q. And to the westerly end line?

A. About 1100 feet.

Q. I see you have a mark here, "Saint's Rest gulch." Can you tell me about where the crest of the ridge would be, or the crest of

the hill would be, to the easterly of Saint's Rest gulch coming over into the next gulch, which I understand to be Revere gulch?

A. The crest would pass through post No. 4 of the Uhlig No. 2, about through the middle of this arrow, and coming down past or near post No. 2 of the St. Joe lode.

Q. So, in which gulch, Saint's Rest gulch or Revere gulch would this discovery stake be?

A. It is in Saint's Rest gulch.

140 Q. Am I correct in saying that the next gulch east is Revere gulch?

A. I think that is what it is called.

Court adjourned until 10 o'clock, Tuesday morning, March 26.

TUESDAY, *March* 26, 1901—10 a. m.

LA FAYETTE G. BURTON, on the stand for further direct examination.

By Mr. CRITCHLOW:

Q. I will ask you whether at the time you made the survey of the Uhlig No. 1 you had with you a copy of the location notice of that claim?

A. Yes, sir; I had such a copy.

Q. Furnished you, I suppose, by the surveyor general's office?

A. Yes sir.

Q. Would you recognize the copy of the location notice?

A. Well, I wouldn't say for sure. It is a long while ago. That (referring to copy shown witness by counsel) is not the copy I used.

Q. It isn't the very copy you used?

A. No.

Q. But whether it was a copy similar to this you are unable to say at this time?

A. I am unable to say—yes.

Q. I direct your attention to the Uhlig No. 2 Lode mining claim, No. 3684. I understand you to say that you made the patent survey for that?

A. Yes, sir; I did.

Q. Which you have put upon the map?

A. Yes sir.

Q. In making that survey, did you find the location corners of the claim?

A. Yes sir.

Q. Won't you state when you made that survey?

A. The survey was commenced on May 12th, 1898.

Q. Commencing now at post No. 1 of the patent survey as you have it located on the map, I ask you whether you found a location stake on that claim that purported to be a corner stake of that claim?

A. Yes sir; the location stake of that corner was north 14 degrees 28 minutes east and 7.2/10th feet from that post of the Uhlig No. 2. The location corner was north 14 degrees and 28 minutes east 7.2/10th feet.

Q. How was it marked?

A. I think it was marked in pencil, but I am not positive.

Q. It was marked, was it?

A. Yes sir.

Q. Directing your attention to post No. 2 of the patent survey, I will ask you whether you found a location corner stake or monument in that vicinity?

A. Yes, sir; there was a small post, marked, and situated north 63 degrees 28 minutes east 34-8/10ths feet from post No. 2 of the Uhlig No. 2.

Q. And it — marked upon the map "L."?

A. Yes, sir; location corner.

Q. That you found, also, marked Uhlig No. 2?

A. Yes, sir.

Q. Directing your attention to corner No. 3. Did you find the location corner for that corner of the Uhlig No. 3?

A. I have it marked in my book location corner, but I don't know how that was marked, or whether it was a post or a mound of stones.

Q. You did find a corner there?

A. Yes, sir; I found some kind of a corner there, because I made a note of it.

Q. I direct your attention to location corner No. 4.

A. That was a 2 x 4 post, marked northwest corner stake of Uhlig.

Q. Did it say Uhlig 1 or 2.

A. It was just Uhlig. The other may have been rubbed off. That is all that was on it at the time, "Northwest corner Uhlig."

Q. At that time, what, if any thing, did you find at the
142 point which you have marked upon the map "Discovery"?

The COURT: Is the Uhlig No. 2 involved in this action?

Judge STREET: Yes, sir; a small conflict.

Mr. CRITCHLOW: Yes, sir—this green through here (indicating.)

The COURT: I understand there are two actions between the same parties?

Mr. CRITCHLOW: The other is with reference to the Mute claim.

Judge STREET: The application is for both 1 and 2. That is why the two areas in conflict are involved in this case.

A. On the Uhlig No. 2 I found a post there, and I think the location notice was posted at the post, although I am not positive.

Q. Do you remember whether the post was marked?

A. My impression is that it was, but I am not positive as to how.

Q. Was that identified to you by any person?

A. Yes, sir; by Mr. Gary, the foreman of the mine.

Q. I see you have marked there "Open cut," 4 x 10 x 8?

A. There is an open cut made at the discovery point—yes, sir.

Q. Did you have at that time when you made this patent survey in May, 1898, with you a copy of what purported to be the location notice of the Uhlig No. 2?

A. Yes, sir; furnished by the surveyor general.

Q. Can you determine whether that copy which you hold in your hand is a copy similar to the one you had or not, at this distant time?

A. Well, I think it is similar, but I don't remember now. It is a long while ago.

Q. You have marked on this Spring lode a point as "Discovery" "Spring discovery." How do you determine that point?

143 A. That was taken from the notes in the surveyor general's office. I located post No. 3 of the Spring.

Q. But the Spring discovery—did you survey that, or only locate it from notes in the surveyor general's office?

A. That was from notes in the surveyor general's office.

Q. Do you know otherwise than from the notes anything about whether that is the Spring discovery?

A. No, sir; I do not.

Q. I suppose these distances are correctly marked eastward from the discovery?

A. Yes sir.

Q. On the Uhlig No. 2—to the end lines; 478.5/10 feet easterly to the end line, and 959.3/10ths feet westerly?

A. Yes sir.

Q. I understand you to say that the ridge between Saint's Rest gulch and Revere gulch runs through the No You Don't, the Mute and the Uhlig claims, and through the Spring claim?

A. Yes. Post No. 4 of the Uhlig No. 2 is very close to the summit, and the middle of the meridian, the arrow on the map, is close to the summit also.

Q. So it runs down there in a general northwesterly direction?

A. To about post 2 of the St. Joe.

Q. In a general northwesterly and southeasterly direction?

A. Yes; that would be the course.

Q. The ridge again—the summit would be here by post 2?

A. Yes sir.

Q. Revere gulch, then, would be over to the easterly of the discovery of the Uhlig No. 2?

A. Revere gulch passes northeast and southwest near post 1 of the Uhlig No. 2.

Q. That would be the bottom of the gulch?

A. Yes. It is marked there in pencil.

Q. So that the ridge between Revere gulch, which passes at about post 1 of the Uhlig claim, and Saint's Rest gulch, which —

144 marked upon this map, would pass through the Uhlig No. 2 claim?

A. Yes sir.

Q. And state whether or not this discovery of the Uhlig No. 2 claim as you have marked it there, would be upon that ridge?

A. It is on the easterly slope of the ridge.

Mr. CRITCHLOW: I offer gentlemen, the location notices of the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims—certified copies of each. They may be marked for identification.

(Marked for identification "B and C—J. W. P.," respectively.)

Mr. CRITCHLOW: I will withdraw that offer for a moment.

(Mr. CRITCHLOW:)

Q. Did you in your patent survey make a sufficient examination of the Uhlig No. 2 claim, either above or under ground, to discover or find mineral in place anywhere upon the claim?

A. Well, I found rock that looked like mineral, but I didn't have any assay made.

Q. You are familiar with the appearance of mineral-bearing rock in that district, are you?

A. Yes sir.

Q. Either at the discovery or in the tunnel did you find any?

A. In the tunnel I found iron stained quartz.

Q. Quartz bearing iron, according to the looks of it?

A. Yes sir.

Q. Did you find any rock bearing other mineral lead or copper?

A. In the St. Joe tunnel I found a little rock bearing lead.

Q. What experience have you had in the matter of examining veins of mineral-bearing quartz or rock?

A. I have been surveying lode claims for the last 15 or 16 years.

145 Q. And surveying in mineral claims—working in them as well?

A. Yes sir.

Q. In veins in the mines?

A. Yes, sir.

Q. Did you discover in there any vein or quartz or other rock which usually bears mineral in that district?

A. Yes, sir; and it was also copper stained.

Q. The copper showed an evident stain? So that the appearance of it could be detected by the eye?

A. Yes sir.

Q. Where did you find the vein in the Uhlig No. 2? Can you determine by the map?

A. Well, I think the best showing was near station 4, and also near station 16.

Q. On this map which you have prepared?

A. Yes, sir.

Q. Near stations 4 and 16?

A. That is the way I have it.

Q. And what did you find there in the way of evidence of a vein?

A. Well, it was rock stained with iron stains and copper stains.

Q. What kind of rock—quartz, quartzite or porphyry?

A. I took it to be quartz.

Q. I will ask you about the showing at the discovery of Uhlig No. 1. Won't you state again what you found there in the way of evidence of mineral-bearing rock in place?

A. I don't remember much about the discovery except the size; that is, the cut of the discovery. But I remember at the shaft there was what looked to be mineral.

Q. What was the evidence of it?

A. That was an iron stained quartz.

Q. And the iron and the quartz were plainly visible to the eye?

A. Yes sir.

Q. Did you find any copper stained quartz as well?

A. I don't remember any copper stains.

146 Mr. CRITCHLOW: We offer first the map prepared and testified to by the witness, as Exhibit A.

Judge STREET: As attorneys for the plaintiff we have no objection.

(Map marked "Def't's Ex. A—J. W. P.")

Mr. CRITCHLOW: We offer in evidence the location certificate or notice, certified by the county recorder of Salt Lake county of the Uhlig No. 1 Lode mining claim to be marked Exhibit B.

Judge STREET: As attorneys for the plaintiff we desire to cross-examine the witness on the subject matter of his testimony.

Mr. CRITCHLOW: Then I will make the offer of both, in as [illegible] ch as they are together. We offer then, gentlemen, the certified copy of the location notice of the Uhlig No. 2, to be marked Defendants' Exhibit C.

Judge STREET: I offer in the first instance to cross-examine the witness solely as attorney for the plaintiff in this case.

Senator BROWN: Our objection has already been interposed.

The COURT: What is it.

Senator BROWN: Personally, we don't care to make any objections, but in view of your honor's statement we interpose the objection.

The COURT: The objection is overruled.

Senator BROWN: We will take an exception.

Cross-examination.

(Judge STREET:)

Q. Mr. Burton, with respect to the Uhlig No. 2 lode, I will ask you whether or not the ridge is outlined on Plaintiff's Exhibit No. 2—is correctly outlined as it passes through the Uhlig No. 2?

147 A. I think it is very close to what it should be.

Q. And on the map, Plaintiff's Exhibit No. 3, is the ridge correctly outlined?

A. I think it is about right.

Q. Passing down through the Uhlig No. 2, and down into the Spring lode?

A. I think so. It is very close to being right.

Q. Will you now point out on Plaintiff's Exhibit 3 where the point on the ridge between Revere and Saint's Rest Gulches about 700 feet westerly from the discovery stake of the Spring Lode patent, will be found?

A. Did you say from the Spring Lode patent?

Q. From the discovery stake of the Spring Lode patent?

A. A point 700 feet westerly?

Q. On the ridge?

A. 700 feet westerly and on the ridge would be a point about here (indicating same on map).

Q. That is a point which on Plaintiff's Exhibit 2 is directly beneath the letters "hl" in the words "Uhlig No. 2," is it?

A. Yes; it would be south of the letters "hl."

The COURT: You had better mark it on the map with some character.

(Judge STREET:)

Q. Mark that point which you have indicated and state to the reporter and court how you mark it, the marking being made on Plaintiff's Exhibit No. 3. You might mark your initials there. You have marked this point with an X and with the letters "L. G. B."

A. Yes sir.

Q. And the X represents the point where such a discovery would carry the point—that point you have described as situated on the ridge between Revere and Saint's Rest gulches about 700 feet westerly from the discovery stake of the Spring Lode patent?

148 A. Yes sir.

Q. You say you used a copy of the Uhlig No. 2 location notice when you surveyed the Uhlig No. 2 for patent?

A. Yes sir.

Q. And a similar copy to the one that is presented here?

A. Yes; I think it is similar.

Q. Did you make search for the discovery of the Uhlig No. 2 at the point that you have marked "X—L. G. B."?

A. No sir.

Q. That is where, under the description in the location notice, the discovery ought to be found, isn't it?

A. Yes, but we are supposed to be guided by the posts.

Mr. CRITCHLOW: We object to that as incompetent and a conclusion of the witness. That is for the court to say. That is a

mixed question of law and fact, which might be a question for the court to determine.

Objection overruled.

Exception by counsel for defense.

(Judge STREET:)

Q. How far from the discovery as marked on your patent survey, and this point marked "X—L. G. B."—how far are those two points separated, and in what direction?

A. The "X" is 500 feet southwesterly from the point marked discovery of Uhlig No. 2.

Q. And where would a distance 1000 feet in a southwesterly direction from the point marked "X—L. G. B." carry the end line of the Uhlig No. 2 claim?

A. It would carry it to a point about where the dash is between "1" and "survey" 3683.

Q. On the Uhlig No. 1 claim?

A. Yes sir.

Q. How far would a distance 500 feet in a northeasterly direction carry it?

A. It would carry it to a point marked discovery of the Uhlig No. 2.

149 Q. Do you personally know anything about the original staking of the Uhlig No. 2 lode?

A. No sir.

Q. Do you know anything whether the stakes you found there were the stakes as originally placed on the Uhlig No. 2 lode?

A. No sir.

Q. Do you personally know whether the discovery you place on the map was the discovery of the Uhlig No. 2 lode?

A. It was shown to me.

Q. I ask you whether you personally know it?

A. No, sir; I do not.

Q. You do not?

A. No sir.

Judge STREET: We desire at this time to object to the admission of the location notice of the Uhlig No. 2 lode upon the ground that the evidence does not in any — establish that the stakes found near the discovery pointed out to deputy mineral surveyer are the original discovery stakes as placed on the ground of that lode, Uhlig No. 2. Secondly, upon the ground that it appears from the evidence of the witness and the description of the location notice itself that the Uhlig No. 2 discovery has been shifted easterly about 500 feet, and that it doesn't correspond in any respect to the calls and references in the location notice and the permanent monument, being a ridge between Revere and Saint's Rest gulches mentioned in the location notice.

Senator BROWN: Do you expect to go further, with the Uhlig No. 1?

Judge STREET: Yes, sir.

Mr. CRITCHLOW: We would like to examine further before we submit the objection.

The COURT: Is your objection withdrawn temporarily?

Mr. CRITCHLOW: We suggest that he make objection to both at the same time.

150 (Judge STREET:) I can submit the same objection later on.

(Judge STREET:)

Q. I will ask you to mark a point 300 feet northerly from the northwest corner stake of the Spring Lode patent on the map—mark it on Plaintiff's Exhibit No. 3. You have marked that N. with a circle, and an X inside the circle, have you?

A. Yes sir.

Q. I will ask you to mark the same distance in the direction of the point marked discovery of the Uhlig No. 1, from the same stake?

A. Which way?

Q. 300 feet in the direction of the point marked discovery of the Uhlig No. 1, from the same corner. How have you marked this point?

A. With an X and an M.

Q. What distance is the point marked with an X and an M from the point marked discovery of the Uhlig No. 1 survey?

A. 235 feet southeasterly.

Q. You may state whether or not the point marked "XM" and the point marked "XN" are not both on the south side of Telegraph hill in Saint's Rest gulch?

A. Yes; they are both south of Telegraph hill, over here. They are south of it. But here is the ravine down here. A point down here would be more south—coming down here—(indicating same on map). These points are on the hill dividing Saint's Rest gulch from the Revere gulch.

Q. And the point marked discovery is in practically the same situation?

A. Yes sir.

Q. They are all three in the same boat?

A. Yes sir.

Q. You don't know anything about the original staking of the Uhlig No. 1 lode?

151 A. No sir.

Q. And know nothing about the original discovery, of your own knowledge?

A. No sir.

Q. The entire data you get is from what you found on the ground—in what year?

A. May 12th, when I commenced the survey, 1898.

Q. And what was told you about it?

A. Yes sir.

Re-direct examination.

By Mr. CRITCHLOW:

Q. You have told us that this Saint's Rest gulch, bottom of the gulch, is indicated by this line on the map?

A. Yes sir.

Q. And the discovery is just above the bottom of the gulch?

A. Yes sir.

Q. Of the Uhlig No. 1?

A. Yes sir.

Q. It isn't in the bottom of the gulch?

A. No sir.

Q. But it is in the gulch?

A. Yes, sir; it's in the gulch. The water from here drops into the gulch. It is on that slope.

Q. The Uhlig No. 1 claim, then, is described in the location notice as running 1400 feet in a southwesterly direction. The direction of the claim, as you have marked it on this line, is south 72 degrees 46 minutes west?

A. Yes sir.

Q. That would be southerly and westerly?

A. Yes sir.

Q. It wouldn't be south, and it wouldn't be westerly?

A. It would be southwesterly.

Q. And the direction—length of it there—is?

152 A. Shown on the map about 1085 feet.

Q. And it was located to run 1400 feet, but you have it within the 1400, being 1085 feet?

A. Yes sir.

Q. And northeast 100 feet, you have a course marked there—north 67 degrees and 25 minutes east?

A. 51.8/10ths feet.

Q. That would be in a general northeasterly direction?

A. Yes sir.

Q. And would be within 100 feet. The location notice calls for a stake situated on the south side of Telegrap- hill. That is on the southerly slope of Telegraph hill?

A. Yes sir.

Q. And about 300 feet northerly from the northwest corner stake of the Spring Lode patent, the place you have marked at Mr. Street's direction here. You have not marked about 500 feet, have you?

A. I marked them 300.

Q. Not about 300, but exactly 300?

A. Exactly 300

Q. As to how much ground a man would walk over and call it about 300 feet, you have no means of knowing or scaling upon a map, I suppose?

A. No, sir.

Q. It is precisely from the discovery point to post No. 3 how many feet, according to your scale?

A. 580 feet.

Q. Taking up the Uhlig No. 2: The location notice calls for a claim beginning at a stake and monument and bearing 500 feet in a northeasterly direction. What is the course of the line along the middle of the claim which runs easterly from the discovery of the Uhlig No. 2?

A. North 50 degrees and 38 minutes.

Q. That would be within five degrees of an exact northeast direction?

A. Yes, sir—and 38 minutes.

Q. Within six degrees of an exact northeast direction?

A. Yes sir.

153 Q. What would that be?

A. It would be northeasterly.

Q. The distance is 478 feet, as you have it upon the map, which, of course, is within the 500 feet, as called for in the location notice?

A. Yes, sir.

Q. The notice calls for 1,000 feet in a southwesterly direction. That runs south 50 degrees 38 minutes west?

A. Yes sir.

Q. And is 959 feet—inside of the 1,000 feet?

A. Yes sir.

Q. The location notice further says that the discovery stake is situated on the ridge between Revere and Saint's Rest gulches. Where did you mark on Exhibit No. 3 of the plaintiff in this case—did you mark a point at Mr. Street's suggestion on the ridge or on the summit of the ridge?

A. On the summit of the ridge.

Q. You didn't mark it on the ridge; but on the summit?

A. Yes sir.

Q. This is the crest of the ridge (indicating on map).

A. Yes sir; that is the crest of the ridge.

Q. Is the ridge a sharp or flat ridge?

A. No, sir; it is very flat.

Q. What would you say about the slope. Is it a continuous slope?

A. A gentle, continuous slope. As it gets down near the ravine, beyond the discovery, the slope is much more abrupt.

Q. According to your measurement there upon Exhibit No. 3, you have measured it as if the ridge were an air line along there, instead of being a flat expanse?

A. Yes sir.

Q. And the ridge slopes very gently, I understand, until you get east of the discovery?

A. Yes sir.

Q. The — goes precipitously down in the Revere gulch?

A. Yes sir.

154 Q. The location notice also calls for a discovery stake at the Uhlig No. 2 as situated 700 feet westerly from the discovery stake of the Spring Lode patent. State whether or not it is situated west of north?

A. Yes, it is north-west.

Q. But not west?

A. Not west; no; it is northwest.

Q. And what is the distance between the Spring discovery and the discovery of the Uhlig No. 2?

A. 665 feet.

Q. The location notice calls for about 700; so that it would be within the distance, and would be west of north?

A. Yes sir.

Re-cross examination.

By Judge STREET:

Q. The point you have marked discovery of Uhlig No. 2, in the direction from the Spring Lode discovery, is considerably nearer northerly than westerly?

A. Well, it is nearer a northerly direction than westerly; but it would be northwesterly.

Q. It wouldn't be a true northwest?

A. No, sir; it wouldn't be true northwest.

Q. It would be a point nearer north than half way between true northwest and north?

A. If you speak of true courses—yes sir. Magnetic courses, it is a question.

Q. It wouldn't be as far westerly as northwest on the magnetic course, would it?

A. I think on the magnetic course it would be much nearer northwest than northerly.

Q. Your arrow is the true north?

A. Yes, sir; it is the true north. The variation is about 17 degrees.

Q. In what class of topography is the discovery of the Uhlig No. 2 located. What class of ground is there around there, as you have marked it on the map?

A. I think most of the ground around there——

155 Q. (Interrupting.) I ask you at the discovery?

A. I am not positive.

Q. Is it not in a little hollow where you have marked it, and not on the ridge at all?

A. I don't remember. I think it is on the slope. It is on the easterly slope from this ridge.

Q. Have you your notes with you?

A. Yes sir.

Q. Do they indicate the character of the topography immediately surrounding the discovery of the Uhlig No. 2?

A. No, sir; they just mentioned the open cut.

Q. In carrying your line for patent through to the ridge did you survey the topography?

A. Where there are any marked features—yes sir.

Q. Do you make any topographical memoranda?

A. Yes sir; where there is any distinct gulch, I note it.

Q. What topographical memoranda did you make respecting the discovery of the Uhlig No. 2 in your notes?

A. All I noted is the open cut.

Q. That is all?

A. Yes sir.

Q. Did you make any topographical reference with respect to it—referring to anything else?

A. All I have noted in regard to the discovery of the Uhlig No. 2 is from the point where the ground is broken—an open cut 4 feet wide by 10 feet long, by 8 feet deep at the face; bears north 85 degrees and 32 minutes west, and the discovery of the Uhlig No. 2 bears south 62 degrees and 48 minutes west 18 3/10ths feet.

Q. On your map which you prepared to post on the ground and to file with the application for patent, you carried out this ridge, didn't you?

A. I think I did.

156 Q. And you showed generally the topographical features?

A. Yes sir.

Q. On the ridge?

A. Yes sir.

Q. Who suggested that you should leave them off on this map?

A. I don't think anybody did.

Q. And the Revere gulch—you put that on?

A. I placed it on here with pencil.

Q. Dosn't the ground from the top of the ridge—doesn't it slope quite rapidly at points before it reached the point marked discovery of Uhlig No. 2?

A. From the top of the ridge, the ridge passes down around here some place (indicating same on map); to the point up here the slope would be rapid; but from the point along here on the side line it would not. I think, going over from the Spring discovery from the top of the ridge, between the Spring discovery and the discovery of the Uhlig No. 2, the top of the ridge is not much higher, if any higher, than the discovery of the Uhlig No. 2.

Q. Is there not quite a gulch between those two points—between the Spring discovery and the point you have marked discovery of the Uhlig No. 2—quite a gulch?

A. I think not; no, sir. I don't remember any gulch between those two points. Between the Spring discovery gulch, going from the Spring discovery gulch to the discovery of the Uhlig you pass over the divide or back bone of the hill. I don't think you go through a gulch. The back bone comes here, as shown on your map.

Q. Between the back bone and the discovery isn't there a gulch?

A. Not that I know of.

157 Q. Did you examine to see?

A. Yes, I have been over it many times since then. There may be a very little draw, but there is no gulch, I don't think.

Q. Don't the works you have got there start pretty well down in the gulch, below the ridge—these works (indicating same)?

A. These works are in the gulch. I don't think it heads up much beyond the mouth of the tunnel; it heads up here a little ways. This is just a little sag; no defined gulch.

Q. You indicate at a point marked "8" on the line of the St. Joe tunnel on this map, a rising slope of land, don't you?

A. I have noted a dump.

Q. Does the tunnel run into the rising ground, or flat, level land?

A. It runs into rising land.

Q. Which way does the land rise?

A. This way (indicating) and it is also rising this way (indicating) say from a point here, I don't think it would be any higher, or as high, in reality, as that at the discovery.

Q. You testified that the back bone of the ridge was accurately represented here?

A. As near as I remember. It is not my survey. As near as I remember the ridge is accurately represented.

By Mr. CRITCHLOW:

Q. What is the magnetic variation at Bingham?

A. Well, it is about 17 degrees, or 17 degrees and 30 minutes.

Q. According to your survey, do you remember what the magnetic variation was.

A. I can't tell you. It differs at every point.

Q. Did it differ in this one survey?

A. Yes; every line differs. There may be a little iron, or a piece of iron pipe, or something lying around, which would affect it. It is about 17 degrees, take it as an average, all through there.

158 Q. If the meridian were drawn here for the magnetic instead of the true north, it would run to the east of true north?

A. Yes, sir.

Q. So that if the meridian, the magnetic meridian, were drawn through the Spring discovery, or through the discovery of the Uhlig No. 2, state whether or not it would throw the discovery of the Uhlig No. 2 more westerly than the true north line would throw it—true north meridian?

A. Yes sir.

Q. Some 17 degrees more to the westerly?

A. Yes sir.

Q. It would be 17 degrees more than you gave it before?

A. Yes sir.

Q. State the course magnetic from the Spring to the Uhlig No. 2 discovery, as nearly as you can?

A. It would be northwest. I don't know whether it would be more north than west. It would be about a northwest course.

By Judge STREET:

Q. Didn't you find a so-called location stake at corner No. 3 of the Uhlig No. 1 a considerable distance westerly from the point you have marked "L. C. 3"?

A. Yes sir; I found a point out here. I marked it there in pencil; and the Greek said that this wasn't the location stake out here, but that the oak stake where I had placed the post *t* there on the Uhlig No. 1 was the location corner of the claim.

Q. Didn't you first set the Uhlig No. 1 corner in the matter of the Greek, Nicholas Castro and others, down here what you have marked 3 on here?

A. No sir; I set it there when I made my first survey, and before filing my notes and working them up, I went out and moved
159 it to this point. I filed no map or notes showing that post on the corner.

Q. What is the distance between the corner as you first placed it and the corner as you have now placed it—corner No. 3 of the Uhlig No. 1?

A. About 185 feet.

Q. How did you come to select the former location corner as accurate—the outer one; not the present corner?

A. There was a mound of stones there and a stake, and I was told that was the corner. The Greek was on the ground at the same time, and he said the oak stake was the corner.

Q. Who told you that was the corner?

A. I think——

Q. Was it Mr. Uhlig?

A. I think it was Mr. Gary.

Q. Was he representing Mr. Uhlig at that time, pointing out the stakes to you?

A. I think he was.

Q. You were doing the surveying for Mr. Uhlig, weren't you?

A. I don't know. I don't remember who the order was issued by.

Q. I am requested to ask you whether you or any of your family have any interest in the Uhlig No. 1 or Uhlig No. 2 claims, either directly or indirectly?

A. No, sir; I have no interest in them. I think a brother of mine is interested.

Mr. CRITCHLOW: We submit the location notices.

Judge STREET: We renew our objection to the Uhlig No. 2 lode, and we won't repeat the objection, if your honor recollects it.

The COURT: Have you any objection to the other location notice?

160 Judge STREET: Yes, sir; we object to the Uhlig No. 1 also.

The COURT: The court is of the opinion that the surveyor,

not being personally acquainted with the ground in controversy, independent of the description contained within the location notice, and the statements made to him by other parties as to where the corners were, the court will refuse to admit at the present time the location notices in evidence, unless his testimony is supplemented, and it is shown by other parties that the stakes and monuments he ran were the stakes and monuments of this claim.

Judge STREET: The ruling is upon both? We make the same objection.

The COURT: The same ruling will be made.

Exception by counsel for the defense.

JOHN B. TAYLOR, sworn for the defense.

Examined by Mr. CRITCHLOW?

Q. Where do you live?
A. Bingham.
Q. Your name is John B. Taylor?
A. Yes sir.
Q. How long have you lived there?
A. Since 1886.
Q. What is your business?
A. I follow mining.
Q. How long have you followed that?
A. I followed that since the 70's.
Q. Did you know Edmund H. Uhlig in his lifetime?
A. Yes sir.
Q. Is he dead?
A. Yes, sir.
Q. When did he die?
A. Last November, I think.
Q. How long had you known him prior to his death?
A. Since 1886.
Q. Had you been associated in any way with him in business?
A. Yes sir.
Q. In what way?
A. He and I were in a great many locations together.
161 Q. In what part of Bingham, in a general way, were his locations?
A. He had some in Saint's Rest gulch, and some on Clipper hill.
Q. Are you acquainted with the Uhlig No. 1 and the Uhlig No. 2?
A. Yes sir.
Q. Since when?
A. Since the 2nd day of January, 1889.
Q. Where were you at that time?
A. I was on the ground on the 2nd day of January, 1889.

Q. Where was Mr. Uhlig at that time and on the 1st of January, 1889, if you know?

A. On the 1st of January?

(Judge STREET:)

Q. Do you know this of your own knowledge?

A. Yes, he was on the ground of the night of the 31st of December—on the ground now located as the Uhlig No. 1 and Uhlig No. 2.

(Mr. CRITCHLOW:)

Q. Where was his place of residence at that time?

A. The greater portion of the time he was living on Clipper hill.

Q. Is that in Bingham?

A. Yes sir.

Q. At what distance from these claims?

A. About two miles and a half.

Q. On the night of the 31st of December, 1888, where was he living? Do you know?

A. He was on this ground known as the Uhlig ground.

Q. Did he have a cabin there?

A. He had a little dug out there.

Q. Was he living there?

A. Yes, he stopped there that night.

Q. Where were you stopping?

A. On Clipper hill.

Q. You have stated that he was on the ground on the 1st of January. State how you know?

A. I came down the hill with him.

162 Q. What hill?

A. Clipper hill; down on the divide there and then he went to the little old dugout. I saw him and another man go on the ground. This was on December 31st, 1888.

Q. Did he state what his purpose was in going to the cabin?

Objected to as incompetent and hearsay?

Objection sustained.

Mr. CRITCHLOW: We take an exception. We offer to show by this witness that at the time Mr. Uhlig left Clipper hill and went to the cabin or dugout upon the Uhlig No. 2 claim on the evening of the 31st of December, 1888, he stated that he was going over there for the purpose of locating the ground now occupied by the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims. That, I presume, comes under your objection, and ruling.

Judge STREET: I insist on the questions being addressed to the witness, so that we can make objections as we go along.

The COURT: Put the questions to him.

(Mr. CRITCHLOW:)

Q. Did Mr. Uhlig state, when he went upon the night of the 31st, the evening of the 31st of December, 1888, from Clipper hill, to this cabin on the Uhlig lode No. 2, as to what his purpose was in going there?

A. Yes sir.

Judge STREET: We think no proper foundation has been laid for this. He has testified simply that he was up on Clipper hill, and Mr. Uhlig started off down the hill in the direction of this so-called dug-out, but this question carries him along to the dug-out, as I understand it. I don't understand that he did go to the dug-out. We object to it because there is no proper foundation laid.

163 Mr. CRITCHLOW: I will submit the question.

The COURT: My recollection is that he answered that he had seen him at or near the dugout.

Mr. CRITCHLOW: He saw him go into the dugout, he said.

Judge STREET: I would like to ask him a question?

(Judge STREET:)

Q. Have you testified, Mr. Taylor, that on December 31st you saw Mr. Uhlig go into the dugout?

A. I saw Mr. Uhlig go to the dugout; I didn't see him go in the dugout.

Q. Where were you when you saw him?

A. On the ridge.

Q. The Clipper Hill ridge?

No response.

Judge STREET: We renew our objection, and make the further objection that it is hearsay and self serving.

The COURT: I think the objection is well taken.

Exception by counsel for the defense.

(Mr. CRITCHLOW:)

Q. State whether or not Mr. Uhlig said, at the time when he left you near the ground and went to the Uhlig No. 2 dugout, or the dugout belonging to him on that claim, that he was going there to the ground to locate the ground which is now occupied by the Uhlig No. 1 and the Uhlig No. 2 claims?

Judge STREET: I object to that as leading, as incompetent and as hearsay. It is leading because it puts into the mouth of the witness what was said, in the first place—suggests what was or may have been said to the witness. If it would be proper under any circumstances, it is improper in this form.

Mr. CRITCHLOW: Your honor has compelled us to ask questions in order to get a record in this case, instead of making an offer to prove. It doesn't come with good grace for him to object

164 to the form of the question when he objects to the offer of proof.

Judge STREET: We have a right to object to the question asked.

The COURT: The question is objected to, and the ground of the objection I assume to be the same as to the previous question, and the same ruling will be made. The court has an impression that the record is quite full on this point and it is no use to repeat the objections every time

Exception by counsel for defense.

(Mr. CRITCHLOW:)

Q. When were you first upon the ground now occupied by the Uhlig No. 1 and the Uhlig No. 2 after that evening when you saw *Mr. Uhlig* go to the dugout on the ground?

A. Second day of January.

Q. At what time of day?

A. About 11 o'clock.

Q. Did you find at that time any evidence of the ground now occupied by these two claims having been recently located. If so, state what they were?

A. I saw the discovery on the Uhlig No. 1 and the discovery on the Uhlig No. 2.

Q. Where was Uhlig at that time?

A. He was in Bingham.

Q. Where, with reference to the discovery, as marked upon Plaintiff's Exhibit A was the discovery of the Uhlig No. 1 as you saw it at that time?

A. I am not conversant with that survey, but approximately speaking I would say——

Judge STREET: We object to that as asking for a conclusion. He can ask where he saw the discovery.

The COURT: He can tell what he saw and what he knows.

165 A. The discovery was approximately about where it is located on that map, as near as I can say. I am not conversant with that survey, therefore I couldn't state definitely as to their surveyed lines.

Q. Do you know a shaft about 4 x 4 feet 45 feet on the east side of Saints Rest gulch, and about 500 or 570 feet northwesterly from the Spring patent?

A. Yes sir.

Q. You know where that is now?

A. Yes sir.

Q. State where with reference to that shaft the discovery was of the Uhlig No. 1 which you saw at that time?

A. It was approximately north.

Q. About how far?

A. Oh, I should say it was in the neighborhood of 50 or 70 feet.

Q. Of which end of the Uhlig No. 1 claim, or where with reference to the location corner stakes of the Uhlig No. 1 claim was the discovery stake that you saw at that time?

Objected to, and question withdrawn.

(Mr. CRITCHLOW:)

Q. I will ask you again: Did you see the location stakes of the Uhlig No. 1 claim on the 2nd day of January?

A. I did.

Q. State as nearly as you can where those different corner stakes were?

A. There was one stake right on the line going up the ridge there from the Spring Lode patent. We used to take that route to go up to the *No You Dont*, following up on the east side of the gulch. They were sitting on a line there, those two stakes were.

Q. Where were the westerly stakes?

A. Over there on the Bear Gulch side.

Q. That is on the west side of the top of the ridge between the gulches?

166 A. Yes, sir; it was quite a good deal further away.

Q. Sat farther westerly?

A. Yes sir.

Q. One of them is now marked as upon the very top of the very crest of the ridge between Saint's Rest gulch and Bear gulches?

A. Yes sir.

Q. Was it further west than that at that time?

A. Yes sir.

Q. And the northwesterly one was further west as well?

A. Yes sir.

Q. Where with reference to these location stakes was the discovery of the Uhlig No. 1 as you saw it at that time?

A. It was approximately near the end line.

Q. Would you be able to state how far from a line drawn between the two location stakes here (indicating)?

A. It would be hard for me to state from that map, because I don't know that survey at all. I haven't been on the ground since the survey was made.

Q. I call your attention to the Uhlig No. 2. Won't you tell us where the cabin or dugout was which you say Uhlig went to on the night of the 31st of December, 1888.

—. I would say it was somewhere very close to the south line there of the Uhlig No. 2, below the arrow there; close to the side line—somewhere in there.

Q. Somewhere south of the Star and near the line between the St. Joe No. 1 and the Uhlig No. 2?

—. Yes, sir.

Q. Whose cabin was that?

A. Mr. Uhlig and myself had occupied it.

Q. For how long?

A. Since 1886, off and on.

167 Q. That would be for two years?

A. Yes sir.

Q. Did you afterwards on the 2nd day of January, or later, than that, see a post or mound or anything there purporting to mark the discovery of the Uhlig No. 2?

A. Yes sir.

Q. Where was that?

A. Just over the ridge on the Revere side, on the northeast.

Q. Between Saint's Rest and Revere gulches?

A. Yes sir.

Q. On the Revere side of the gulch?

A. Yes sir.

Q. How was that discovery marked?

A. There was a post set there, and it was in a pile of rocks.

Q. Did you observe the notice?

A. Yes sir.

Q. Of what claim did it purport to be the notice?

A. It purported to be the location notice of the Uhlig No. 2.

Q. At that time or any other time did you see the location corners of the Uhlig No. 2?

A. Not the northeast corners—no, sir—didn't go to them.

Q. Did you see the corners on the northwest end of the claim? Or the westerly end?

A. Yes sir.

Q. Will you state where those were?

A. They were union corners at that time, and represented the two claims.

Q. That is to say, the corners of the Uhlig No. 1 and the Uhlig No. 2 were identical?

A. Identical.

Q. The northwest corner of the Uhlig No. 2 being the northe-st corner of the Uhlig No. 1.

A. Yes sir.

Q. And the southwest corner of the Uhlig No. 2 being the southeast corner of the Uhlig No. 1.

A. Yes sir.

Q. Did you observe the marking upon the stakes?

A. I noticed there was a mark—Uhlig lode.

Q. What, if anything, in the way of a mineral discovery
168 was there at the discovery of the Uhlig No. 2?

A. At that time on the Uhlig No. 2, the ground was covered with snow.

Q. Later did you see it in that year?

A. Yes sir.

Q. 1889?

A. Yes sir.

Q. Any work done there then?

A. Well, there was quite a little scratching around in different places.

Q. And any showing of mineral bearing rock?

A. Yes sir.

Q. In place?

A. Yes sir.

Q. Bearing what minerals?

A. Well, it was heavily iron stained, and I have had one or two assays that carried 4 or 5 ounces of silver.

Q. Now as to the Uhlig No. 1, what do you say as to mineral there?

Judge STREET: If we can make an admission, we will admit that there are mineral indications in that ground.

Mr. CRITCHLOW: I think if you are satisfied, the Government will be.

Cross-examination.

Examination by Judge STREET:

Q. You say there were union corners; that is, where the Uhlig No. 1 and the Uhlig No. 2 adjoined each other, they had the same corners?

A. Yes, sir; at that time.

Q. Was this about down towards the bottom of the gulch where the Uhlig No. 1 corner was?

A. No, I think it was higher up there.

Q. Was it approximately 300 feet, do you think, from the discovery?

A. I don't know about that. I didn't measure it at all; I couldn't say definitely.

Q. Was the upper corner approximately 300 feet from the discovery?

A. I should judge so; I wouldn't say so definitely.

169 Q. So that, if now the Uhlig No. 2 upper corner, where the two lodes join each other, is 145½ feet from the upper corner of the Uhlig No. 1, it must have been shifted since you saw it?

A. Well, I understand it isn't as it was when I was there. Those claims—one was a continuation of the other originally.

Q. You had not nothing to do with the shifting of the stakes?

A. No, sir.

Q. You say you examined these stakes on January 2, 1889?

A. Yes sir.

Q. Please explain how you happened to go over there, from the discovery of the Uhlig No. 1 down to Saint's Rest gulch, up the ridge and over into Bear gulch, over the ridge between Saint's Rest gulch and Bear gulch, to examine for those two corner stakes?

A. Coming down this ridge—Clipper hill is here—I followed it down here. Mr. Uhlig and I were partners, and he located this ground, and I located some there higher up. Next morning when I came down I wanted to see whether the old gentleman had made the locations properly, and I came down along here and followed the old road down, and then cut across the gulch to find where he had been.

Q. Where did you go?

A. Approximately down through here (indicating same on map).

Q. This way?

A. No; this way (indicating same).

Q. I want to get this on the record. You came southwesterly of the corner of the Uhlig, and farther over to Bear gulch; then you walked approximately along the south side line?

A. No; down here (indicating same).

Q. Entirely south of the Uhlig No. 1 and Uhlig No. 2 claims?

170 A. Yes sir.

Q. Then you went through Saint's Rest gulch?

A. Yes over here, and over to the cabin, and it set somewhere about here; it is approximately about here (indicating place on map).

Q. And Mr. Uhlig wasn't there?

A. No sir.

Q. How long were you there?

A. Probably two hours and a half going around on the hill. I think I got down about half past two o'clock.

Q. Did you go up to these corner stakes?

A. I went up there here and them there (indicating same on map) and went up this ridge, coming down like this, to see whether that discovery had been set over there. I didn't go to those corners (indicating) at all.

Q. Did you read the description?

A. Yes sir.

Q. Did you know where the Spring discovery was?

A. No; not definitely; but about some point in here (indicating same on map). There's a pipe line come from the Spring lode, and we used to conduct water around there. We used to call that the discovery. Whether it was the true discovery or not I couldn't say.

Q. Where is the cabin or Clipper hill with reference to Uhlig No. 1 lode?

A. It was just on the west side of Clipper hill.

Q. In what direction?

A. A little southerly and westerly.

Q. What gulches did you pass in coming down from your cabin on Clipper hill to get to the dugout?

A. I came right over the ridge. Here is the head of Carr fork For instance it would be here. Here comes Muddy fork.

171 Q. All on that south side?

A. Yes sir.

Q. Where did you pass?

A. I came right around the ridge at the head of all the gulches.

Q. How far south of the Uhlig No. 1 lode would that take you?

A. Oh, that would be perhaps three quarters of a mile, may be a mile off, coming on this ridge here.

Q. Tell me how you happened to see corner stake No. 4?

A. Because I was looking for them.
Q. Where did you see it there?
A. I saw it from about 100 feet.
Q. Were you interested in the Uhlig No. 1 lode?
A. Yes sir.
Q. Did you own an interest in it?
A. Yes sir.
Q. Did you ever have it conveyed to you?
A. No.
Q. It wasn't located in your name?
A. No sir.
Q. Do you know where Nicholas Castro lived?
A. Yes sir.
Q. Were you in sight of Castro's cabin when you saw those stakes?
A. Yes, sir; here is his cabin, right about here (indicating locality on map).
Q. In which direction from corner stake No. 3 is Castro's cabin?
A. It would be pretty near southwest.
Q. How near the bottom of Saint's Rest gulch was the corner stake of the Uhlig No. 1—practically down at the bottom of the gulch?
A. Oh, no; quite a ways.
Q. Don't you know that Clipper hill lies northerly?
A. No, sir; I think not.
Q. Is it the ordinary route to pass the old Telegraph mill?
172 A. No, sir; the old wagon road passes around the head of the gulch and came around to the old Jordan mill.

Mr. CRITCHLOW: We renew our offer, if the court please.
Senator BROWN: We offer each of these. We have shown the discovery to be the same here as it is in the description; we have shown now that the survey is within those lines. The fact that the courses might not exactly correspond makes no difference. The general monuments would control the courses. Each one of these descriptions conforms to the description as laid down on the map. My associate says that I should point out whether it has shifted or not. They have been drawn in. That is not a shift, in the sense of that word. It was proper to draw the lines in from where they were. Each of these posts have been drawn in, or some of them.
Mr. CRITCHLOW: The statements of the witness is that the points were identical here (indicating same on map) It is to be assumed, then, that the corner of Uhlig No. 2 was down here; the corner of Uhlig No. 1 was up here. Instead of drawing in the Uhlig No. 2 in the same way that Uhlig No. 1 was drawn in, the Uhlig No. 2 seems to have been thrown up that way and the Uhlig No. 1 drawn down this way. Undoubtedly the claim was too wide.
Judge STREET: I object now to the present offer to place the exhibits in evidence, upon the ground that it has been shown by the

evidence of this witness that either the Uhlig No. 1 or the Uhlig No. 2 lode has been shifted from the original staking upon the ground, and that until an explanation is made of this, as against the Government, and as against the plaintiff in this case these notices are inadmissible; and in support of the objection I will state to your honor that the map shows that each of these claims is a claim for the full width of 600 feet.

173 (Objection argued to the court at length by respective counsel.)

Judge STREET: We also desire to repeat our objection made to the Uhlig No. 2 notice, that the present location of the discovery of the Uhlig No. 2 doesn't correspond to a large degree with the ties in the location notice, and also that the present discovery of the Uhlig No. 1 does not correspond with the ties set forth in the location notice.

The COURT: The court will hold that the boundaries of the claim as indicated by the stakes upon the ground would control the calls in the notice; also, that in so far as the shifting of the boundaries of either one of these claims, and the testimony introduced to show that there was a shifting of the corner monuments or exterior boundaries, there is no evidence of bad faith on the part of the locator in the moving of stakes or boundary lines; there is no injury done to the Government or any prior locator; that he would have the right to make those changes when in fact no one is hurt in the land abandoned; if the boundary lines should be drawn in, the land taken in extra by the extension of the boundary lines being contiguous to the portion actually bounded by the monuments, no harm would be done, and the authorities seem to hold that in the absence of fraud or any infringement upon prior rights, that this might be done. I will overrule the objection to the introduction of the notices on the grounds stated.

Judge STREET: I understand the objections are overruled.

The COURT: Yes, sir.

174 (Marked by reporter as Defendants' Exhibits B. and C, respectively, and read to the court by Mr. Critchlow, as follows:

Uhlig No. 1 lode.

Notice is hereby given that the undersigned has this 1st day of January A. D. 1889 located and claimed this lead lode or vein 1500 linear feet by 600 feet in width being 300 feet on each side of the center of the vein, beginning at this stake and monument and running 1400 feet in a southwesterly direction and 100 feet in a northeasterly direction, with 300 feet on each side of the center of the vein to the extent of this location.

Discovery stake is situated on the south side of Telegraph hill in St. Rest gulch about 300 feet northerly from the north west corner stake of the Spring Lode patent, in West Mountain mining district, Salt Lake county, Utah Territory.

This claim shall be known as the Uhlig No. 1.

EDMUND H. UHLIG, *Locator.*

Filed for record January 1, 1889, at 9:20 o'clock a. m.

JOHN BRUNTON, *Recorder.*

Certificate.

STATE OF UTAH, }
County of Salt Lake, } ss:

I, Thomas Alston county recorder in and for said county do hereby certify that the above and foregoing instrument of writing is a full, true and correct copy of the notice of location of the Uhlig No. 1 Lode mining claim, situated in the West Mountain mining district, Salt Lake county, Utah, as the same appears of record in Book "O" of Locations at page 217, records of Salt Lake county, Utah.

Witness my hand and official seal at Salt Lake City, this eleventh (11th) day of March, A. D. 1901.

THOMAS ALSTON,
Recorder, Salt Lake Co., Utah,
By A. E. CARR, *Deputy.*

(Seal, and 10 cent revenue stamp affixed.)

Uhlig No. 2 lode.

Notice is hereby given that the undersigned has this 1st day of January, A. D. 1889 located and claimed this lead, lode or vein 1500 linear feet by 600 feet in width being 300 feet on each side of the center of the vein. Beginning at this stake and monument and bearing 500 feet in a northeasterly direction and 1000 feet in a southwesterly direction with 300 feet on each side of the center of the vein to the extent of this location. Discovery stake is situated on the ridge between Revere and St. Rest gulches, about 700 feet westerly from discovery stake of the Spring Lode patent in West Mountain mining district Salt Lake county, Utah Territory. This claim shall be known as the Uhlig No. 2.

EDMUND H. UHLIG.

Filed for record January 1st, 1889, at 9:22 o'clock a. m.

JOHN BRUNTON, *Recorder.*

Certificate.

STATE OF UTAH, }
County of Salt Lake, } ss:

I, Thomas Alston, county recorder in and for said county, do hereby certify that the above and foregoing instrument of writing

is a full true and correct copy of the notice of location of the
175 Uhlig No. 2 Lode mining claim, situated in the West Mountain mining district, Salt Lake county, Utah, as the same appears of record in Book "O" of Locations at page 218, records of Salt Lake county Utah.

Witness my hand and official seal at Salt Lake City, this eleventh (11th) day of March, A. D. 1901.

THOMAS ALSTON,
Recorder, Salt Lake Co., Utah,
By A. E. CARR, *Deputy.*

(Seal and 10 cent revenue stamp affixed.)

Mr. CRITCHLOW: It is stipulated between counsel that the St. Joe Mining Company is a corporation organized and existing under the laws of the State of Utah, and has been since the 28th day of October, 1897, and that all of the corporate stock is held by citizens.

Judge STREET: In so far as we can admit the latter fact, we do so. We admit the incorporation, and so far as we can admit the citizenship of the stockholders, we do so.

Mr. CRITCHLOW: I offer in evidence now a deed from Edmund H. Uhlig to the St. Joe Mining Company, dated October 6, 1900, recorded October 30, 1900, in Book "Q" of Mining Deeds, page 530 of the records of the county recorder of Salt Lake county, purporting to convey, for a consideration of $5,333, all the right, title and interest, estate, claim and demand, in possession and expectancy, of the said Uhlig in and to those certain premises, claim and mining right, containing precious metals of gold, silver, and lead and other metals, and situate in the West Mountain mining district, State of Utah, and described as follows: Ninety-nine one hundredths (99/100) of two-thirds (⅔) interest of the "Uhlig No. 1." "Uhlig No. 2, "Ida" and St. Joe No. 1" the location certificates of which said claims being recorded in the office of the recorder for Salt
Lake county, in Book "O" of Locations respectively on pages
176 217, 218, 437 and 323, to which record reference is had for a more particular description, and in the county of Salt Lake, State of Utah. "This deed is intended to convey the balance of my undivided two-thirds interest in said property."

(Received in evidence without objection, and marked by reporter "Def't' Ex. D—J. W. P.")

Mr. CRITCHLOW: We also offer in evidence the certified copy of a deed from Edmund H. Uhlig, of Salt Lake county, Utah, to the St. Joe Mining Company, a corporation, for an undivided one-hundredth part of two-thirds interest in each of the following described lode mining claims, situated in or near Saint Rest gulch, in the West Mountain mining district, Salt Lake county, Utah, to-wit: The Uhlig No. 1, the Uhlig No. 2, and other locations, recorded in the office of the county recorder of said county, in Book "O" of Loca-

tions, on pages 217, 218, 437 and 323, to which record reference is had for a more particular description. This deed is dated December 15, 1898, duly acknowledged, and is recorded in Book "Q" of Mining Deeds, page 258, on December 20th 1898.

(Same received in evidence without objection.)

Dr. R. A. HASBROUCK, recalled by the defense.

Examination by Mr. CRITCHLOW:

Q. You are president of the St. Joe Mining Company?

A. Yes sir.

Q. You have been president how long?

A. Since the incorporation.

Q. State whether or not you are familiar with the work done upon the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims—I mean the assessment claims?

A. Yes sir.

177 Q. For the year 1897?

A. Yes sir.

Q. State whether or not you caused a certificate showing the labor to have been done to be filed in the office of the county recorder of Salt Lake county in that year?

A. Yes, sir. I believe it was made by Mr. Gary.

Q. Were you familiar with it at the time—with the work?

A. Yes sir.

Q. Done in that year?

A. Yes sir.

Q. State whether you have seen that certificate?

A. No, I have never seen that certificate.

Q. State of your own knowledge—state what work was done, of your own knowledge, in the year 1897?

A. In the year 1897 there was some work done at the discovery point of each claim.

Q. What was the value of the work done on the Uhlig No. 1?

A. I think there was about two days' work done on the Uhlig No. 1 proper, and the most of the work was done in a tunnel that is running from the Uhlig No. 2 to the St. Joe lode No. 1. There was about 180 feet of rock work done there—tunnel work; and at the mouth of the tunnel which appears upon the Uhlig No. 2 running towards the Mute No. 1, there was 20 to 40 feet of work done there.

Q. What was the total value of the work done at that time, in 1897, if you know?

Judge STREET: We would like to know what application it is proposed to make of this—if it is proposed to apply this work to either of these tunnels, one running towards the Mute and the other towards the St. Joe.

(Mr. CRITCHLOW:)

Q. At that time what claims were held and worked in common with the Uhlig No. 1 and Uhlig No. 2 lodes?

A. The Mute.

178 Judge STREET: We object to that, as the record shows that the interest of the St. Joe Company in that claim was acquired subsequent to that date.

The COURT: You may show what work was done, the nature and character of it and where done, and its application towards the development of these claims by the owners at the time the work was done.

(Mr. CRITCHLOW:)

Q. Where was work done in the year 1897—at what point?

A. There was work done at the discovery points—at this discovery point of the Uhlig No. 1 and the discovery point of the Uhlig No. 2, and 180 feet of tunnel on this St. Joe tunnel, and about 20 to 30 feet of work done here (indicating) at this time.

Q. That is—what do you call that?

A. At the Uhlig tunnel, the mouth of which lies easterly of the discovery of the Uhlig No. 2. I see this is marked Uhlig No. 2, but in all of our books and all our writings we know it by Uhlig tunnel.

Q. What was the value of the work done at these places you have described in 1897?

A. I think we estimated that at about $6.00 a foot. There was about 200 feet, which would be about $1,200.

Judge STREET: We object to that, and move that it be stricken out.

Mr. CRITCHLOW: That may go out.

(Mr. CRITCHLOW:)

Q. What was about the actual value—in money, in your best judgment?

A. According to my best judgment, I think it cost us about $1200.

Judge STREET: We object to it. He doesn't seem to know anything about the work, or its value.

179 The COURT: I think he may answer. He says he is the president of the company.

A. I have been manager.

The COURT: He has described the work; he knows it has been done.

(Mr. CRITCHLOW:)

Q. It cost you $1200?

A. Yes sir.

Q. State whether or not, in your judgment, that was a reasonable amount to pay for the work which you did at that time?

A. Yes, sir; a reasonable amount.

Q. In the year 1898, will you state what amount was done at that time, and in what year, and at what points?

A. The work in 1898 was all—the most of it was done in this tunnel—Uhlig tunnel.

Q. To what extent?

A. We also built a building here (indicating place of map.)

Q. Where, and to what extent was the work done?

A. In 1898, this tunnel was run from its mouth to this point.

Q. What point is that?

A. To a shaft sunk—at the junction of the main tunnel with this shaft. There was a shaft sunk 14 feet on the vein, and this shaft was run.

Q. A drift southerly from the main tunnel?

A. Yes sir; southwesterly, and I think the tunnel was carried almost to a point, almost to this point on the Mute No. 1.

Q. That would be the south line of the Mute No. 1?

A. Yes, sir; about 600 feet, I think.

Q. What amount of work in dollars and cents was done during that year—1898?

A. Between $4,000 and $6,000 worth of work. There were other improvements besides this tunnel. There was a trail made
180 1300 feet—a 12 per cent. trail; there were trails made over the hill, and a building erected at the mouth of the tunnel to accommodate eight men, and a blacksmith shop.

Q. What do you say as to whether those improvements upon the surface you have mentioned, the trails and these building and shops, tended to reasonably develop the Uhlig No. 2 lode?

A. Yes sir.

Q. In 1899 what work was done and where?

Recess of court until 2 o'clock p. m.

2 O'CLOCK P. M.

Dr. R. A. HASBROUCK, recalled for further direct examination.

By Mr. CRITCHLOW:

Q. In 1899 what work was done upon or for the benefit of the Uhlig No. 2 Lode claim, and where was it done, and to what extent or value?

A. The work was done in the Uhlig tunnel for the Mute No. 1.

Q. Was any work done on this St. Joe tunnel?

A. No work was done there in 1899.

Q. What was the amount of the expenditures in 1899 in the Uhlig tunnel?

A. Between $4,000 and $6,000, I believe.

Q. That was the extension of the tunnel for the purpose of development?

A. Yes sir; and the starting of a draft at about this point here.

Q. At what station—No. 5.

A. Yes.

Q. In which direction?

A. In a southwesterly direction.

Q. I understand you from your testimony that all of the work done on those claims is not shown upon that map?

A. No sir.

181 Q. Do you know whether the surveys for the map were made before the work was done?

A. The work that was done on the ground before we went there is not shown, except some on the St. Joe tunnel. We extended that tunnel. We also did work for those claims below there, on claims that are still farther down the mountain.

Q. In 1900 where was work done on the Uhlig No. 2 claim and to what extent, and what was the nature of the work?

A. The tunnel was extended outside the line of the Uhlig No. 2 claim. The first drift we termed the blacksmith shop drift, and it was extended about 140 feet in a southwesterly direction. We started on the hanging wall of the vein. I can show you the point.

Q. Never mind.

A. Continuing—and run in 285 feet; on the foot wall of that which we term the black vein, we run in on that 40 feet.

Q. What was the total of the expenditures which you made in 1900 in making those developments?

A. Well, the money we spent in 1900 for development work would amount to fully $10,000, but it wasn't all done upon this Uhlig claim.

Q. How much of that was done?

A. On Uhlig No. 2?

Q. Yes.

A. How much?

Q. How much of that was done upon the Uhlig No. 2?

A. Between 2,000 and $3,000.

Q. Won't you state in what direction the vein or veins, if there be more than one, run in the Uhlig No. 2 and in the Uhlig No. 1 claims?

A. The strata veins have a course about northeast and southwest, and dip probably 33 to 40 degrees.

Q. Can you illustrate on the map about where those veins come to the surface?

A. Yes sir.

182 Q. I wish you would do so?

A. We have what is called the St. Joe lead. The croppings will come much about this point and take this course through here.

Q. That would be about the middle and lengthwise of the St. Joe claim, as shown upon that map?

A. Yes sir.

Judge STREET:

Q. And not touch the Uhlig either 1 or 2?

A. I will explain. This vein, while it is cropping here, is opened at the blacksmith shop and further down the hill and in the gulch at this point, and we have the foot wall, after we get in here about 120 feet and get the quartzite foot wall, and the course of it would be in these claims as we have opened them here, about through in a southwesterly direction.

Q. That would be, if I understand you, a little south of the middle line of the Uhlig lode and lengthwise upon the lode and going through the southeast corner of the Uhlig No. 1?

A. Yes sir; should pass through there. It may be a little to the west as we go in on it.

Q. That is, a little towards the west?

A. Yes sir; at this point here, station 15, we get the foot wall, the quartzite foot wall, and run in on that about 40 feet, this same direction, but the hanging wall is right in here; the vein is about 400 feet across it.

Q. In here? You mean northerly in the Uhlig tunnel?

A. Yes sir.

Q. That is quite deep underground?

A. Yes sir.

Q. There you get the hanging wall of the same vein?

A. Of the second vein. This is the first here (indicating).

Q. You get the hanging wall of the vein somewhere just southerly of the northerly side line of the Uhlig No. 2?

183 A. I think it is about pretty close to 400 feet in station 15 before we get to the hanging wall. The outcroppings show at the discovery point of the Uhlig No. 2. The ridge goes around here and back this way pretty well down here, and as you go into the gulch it comes back to this point here (indicating).

Q. As it comes out of the westerly end of the Uhlig No. 2 it goes into the Uhlig No. 1?

A. Yes sir.

Q. And north of the discovery point of the Uhlig No. 1 or where?

A. About the discovery point.

Q. Of the Uhlig No. 1?

A. Yes sir.

Q. And extends on westerly?

A. Yes, sir.

Q. What do you say as a mining man, from your experience in the development of these and other mining claims, as to whether the work which you have described as having been done since 1897 on the Uhlig No. 2 Lode mining claim, tends to reasonably develop the lode or lodes or veins which pass through the Uhlig No. 1?

A. The work is done for that purpose.
Q. I ask you whether it reasonably tends to develop that claim.
A. Yes sir.

Cross examination.

By Judge STREET:

Q. Where does vein No. 2 show at the surface—an outcrop?
A. Well, I don't understand what you have reference to as vein No. 2.
Q. You called it yourself vein No. 2—second vein?
A. The outcrop is at the discovery point of the Uhlig No. 2, and it shows at the discovery point of the Uhlig No. 1.
Q. Where else?
A. And along the Uhlig Lode——
Q. (Interrupting.) Where does it actually show at the surface?
A. The whole distance across the Uhlig No. 2 and across the Uhlig No. 1.
184 Q. Is there any part of it that is covered with debris—wash?
A. There might be a little in the gulch—the Saint's Rest gulch.
Q. Between the discovery point of Uhlig No. 2 and the discovery point of Uhlig No. 1 do I understand you that there is a continuous outcrop of the vein in place?
A. The vein in place; yes, sir.
Q. And continuing on from Uhlig No. 1 how far does that outcrop show on its face?
A. It will show across the Uhlig No. 1.
Q. Where does it pass out of the Uhlig No. 1?
A. It passes out of the Uhlig No. 1 about 200 or 300 feet from the southwesterly corner.
Q. Though the end line?
A. Through the end line—yes, sir.
Q. Does the country rock crop out of the Uhlig No. 1 and the Uhlig No. 2?
A. Yes sir.
Q. Is the line between the country rock and the vein traceable on the surface of the Uhlig No. 1 and the Uhlig No. 2?
A. Yes sir.
Q. What distinguishing characteristic is there between the country rock and the vein as shown at the outcrop?
A. We have a quartzite foot wall and porphyry between the walls.
Q. You consider the porphyry as the vein?
A. The porphyry is the vein matter.
Q. How wide is the vein?
A. The black vein about 400 feet across it between the walls, as cut by the tunnel.
Q. Mineralized all the way through?

A. Yes sir. Our average assay for the 400 feet by hand sample is $5.08 for the distance between the walls.

185 Mr. CRITCHLOW: We want to put in the record for application for patent, which is to be sent down by Mr. Hobbs. It should have been here about half past one. And Mr. Casey has gone up stairs to get the order dismissing, and so on, in the case.

Judge STREET: Will you rest with the exception of that?

Mr. CRITCHLOW: Yes, sir.

Judge STREET: I move to dismiss the counter claim, whatever status the application of the defendant for this ground now occupies, upon the ground that they haven't proven that the ground covered by the Uhlig No. 1 lode and the Uhlig No. 2 lode was vacant, unoccupied public domain at the time the lodes are purported to have been located.

Mr. CRITCHLOW: I think that would be a negative which we wouldn't be called upon to establish. Nobody could do anything more than go upon what is apparently the public domain, not claimed by any body else, not shown here to be claimed by any body else. Of course, the court would presume it was unoccupied public domain; otherwise the locator would be called upon to prove a negative, which he never could do.

The COURT: The parties making application for patent, so far as the testimony shows that they were competent to make the location and did make it, and have published a notice of the application for a patent—which proof, I suppose, will be supplied when it comes in——

Mr. CRITCHLOW: Yes sir.

The COURT: And there being no adverse claim filed, the law assumes that the applicants are entitled to a patent. The ex-

186 amination of the witnesses does not show but what the parties have complied with the law relative to the location and occupation and patenting of lode mining claims, and the objection will be overruled.

Judge STREET: We will note an exception. We prefer to have the other side finish their case before we put on rebuttal evidence.

Mr. CRITCHLOW: We offer in evidence in this case the order of this court made in this case on the 22nd day of November, 1899, as recorded in Minute Book No. 6 of the records of this court, on page 610.

Judge STREET: I take it, it is an antecedent record, and doesn't properly belong here as a matter of evidence at this time?

Mr. CRITCHLOW: We offer it formally as evidence.

Judge STREET: I will withdraw the objection.

Mr. CRITCHLOW: I will read the record for your honor's information. The motion is entitled in this cause (reads)

"The motion to quash the summons heretofore issued and to dismiss the plaintiff's complaint herein, having been heretofore fully

argued and submitted, and the court having duly considered the same, and being fully advised in the premises, it is now ordered that said summons heretofore issued in so far as it may respect the defendant Alexander McKernan be, and the same is, hereby quashed. And it is further ordered that the plaintiff's complaint, in so far as it may respect the defendant Alexander McKernan, be, and the same is hereby dismissed. And it is further ordered that the demurrer to the plaintiff's complaint, in so far as it may relate to the defendant Uhlig, be and the same is hereby overruled."

Mr. CRITCHLOW: Now, with the exception of these patent application papers, we rest.

187 Before doing so, however, and Mr. Street not objecting to our opening the case again for that purpose, we will offer now in evidence certified copies of the affidavits of the parties of labor performed in each of the four years to which the testimony has been directed—1897, 1898, 1899 and 1900. These being affidavits recognized by the law of Utah. They would be in aid of the good faith and possession of the defendant of this ground, and I think would be competent on that score.

Judge STREET: I think, in view of the evidence of Dr. Hasbrouck, these are entirely superfluous. They might be insufficient under the law, but we make no objection to their admission.

(Papers marked by reporter respectively, as Def'ts' Exhibits E. F. G and H. with the initials "J. W. P.")

Judge STREET: We might put Mr. Mayberry on the stand, and let the official records go in afterwards.

188 ANDREW P. MAYBERRY, sworn for the plaintiff, in rebuttal.

Examination by Judge STREET:

Q. Your name is Andrew P. Mayberry?
A. Yes sir.
Q. Where do you live?
A. Bingham.
Q. How long have you lived there?
A. Off and on since '86.
Q. Are you familiar with the ground in the vicinity of the No. You Don't patent?
A. Somewhat.
Q. At one time did you locate a claim there?
A. I located two claims there.
Q. At what time did you locate those claims?
A. January 1st, 1889.
Q. What were the names of the claims you located?
A. The Levi P. and the Veta.
Q. When did you locate the Levi P. claim?

A. When?
Q. As to the time of day?
A. About five minutes past 12, on January 1st, 1889.
Q. Is that five minutes after midnight of December 31st?
A. Yes sir.
Q. 1888?
A. After December, 1888, yes sir.
Q. What did you — with respect to the Levi P. claim?
A. Simply posted a notice and recorded it.
Q. When did you go on the ground?
A. About a quarter to 12, December 31st. 1888.
Q. What kind of a night was it?
A. It was a fairly good night.
Q. Did you see anybody else in the immediate vicinity of where you were?
A. No; only my brother. He was with me.
Q. Did you personally locate the Veta claim?
A. No, sir.
Q. Do you know who did locate it?
A. My brother.
189 Q. Where is the Levi P. claim situated with respect to the No You Don't?
A. On the southerly side of it.
Q. Will you please examine this Plaintiff's Exhibit No. 2 and indicate where the discovery of the Levi P. claim was?
A. I don't know about that map. There is nothing on there that would indicate to me just where that discovery was. There's a bluff; if that was on the map I could tell.

(Senator BROWN:)

Q. There is nothing there to indicate the location of the Levi P.?
A. Not on that map.

(Judge STREET:)

Q. Were you at that time familiar with the ground upon which the Levi P. was located when you went on there?
A. Yes, sir.
Q. Had you seen it before?
A. Yes, sir.
Q. Examined it?
A. Yes, sir; I had been over it.
Q. State whether or not there was mineral bearing rock in place there?
A. There was.
Q. Did you stake the Levi P.?
A. Yes sir.
Q. When did you stake it?
A. In some four or five days I think it was, after making the location.

Q. What stakes did you place on the Levi P.?
A. 4 x 4's.
Q. And at what places?
A. At the corners.
Q. Did you place a stake at your discovery?
A. It was a piece of board that the notice was tacked on.
Q. Where did you place it?
A. At the discovery.
Q. Did you file for record a notice of your location?
A. I did.
Q. I will ask you to examine this document, which we will call for identification Plaintiff's Exhibit X. Do you know whether or not that is a copy?
A. I couldn't say that is word for word, but it is similar. If that is a true copy of what was filed with the recorder, I suppose it is.
190 Q. With what recorder did you file your notice?
A. The district recorder.
Q. West Mountain mining district?
A. I think John Brunton.
Q. Do you recollect what time you filed it with him for record?
A. It probably was half past 1 or 2 o'clock that afternoon, when I came down town.
Q. State whether or not you staked the Levi P. according to the calls of your notice?
A. Did I.
Q. Where did you place the stakes of the Levi P. with reference to the No You Don't?
A. I started at the southwest corner of the No You Don't—made that a common corner for the Levi P. It would be the northwesterly corner of the Levi P. and southwest corner of the No You Don't.
Q. Then where did you place your next stake—what corner of the Levi P.
A. 300 feet down the hill, in a southeasterly direction, more southerly than easterly, I placed another corner, which answered for a corner of the Veta.
Q. You say it answered as a corner for the Veta—common corner for the Levi P and the Veta?
A. Common corner for both.
Q. Did you also assist in staking the Veta?
A. Yes sir.
Q. Where did you place your next corner of the Levi P.?
A. The next corner we placed was a Veta corner. We came down to this——
Q. (Interrupting.) Do you mean 300 feet down the hill?
A. Yes. Or 600 feet, I mean, down the hill.
Q. The next one was a Veta corner?
A. Yes sir.

Q. How far down was that?

191 A. 600 feet beyond the common corner.

Q. Where was the next stake placed?

A. The next stake was this common corner between the Levi P. and the Veta.

Q. What common corner?

A. Between the Levi P. and Veta.

Q. What corner—what place?

A. It was the southeasterly corner of the Levi P. and the northeasterly corner of the Veta.

Q. Where was your next stake placed?

A. Northeast corner of the Levi P.—that corner up there (indicating same on map).

Q. You mean, the most northerly corner of the Levi P., as sketched on this map?

A. Yes sir.

Q. Did you place any other stakes that you know of?

A. We placed a stake on the southeast corner of the Veta.

Q. That is the corner down here, shown on the map—farthest corner towards the southeast of the Veta?

A. Yes sir.

Q. Did you measure the distance between the southeast corner and the southwest corner of the Veta?

A. No.

Q. Did you estimate the distance?

A. We simply run a line, as we thought, between the two claims, a center line.

Q. What distance did you run the line?

A. That line we ran nearly 1700 feet.

Q. What was your object in running it more than 1500 feet?

A. Because if we set our stakes too far out we could be made to draw them in, but we couldn't draw them out.

Q. Did you intend to claim more than 1500 feet?

A. No, sir.

Judge STREET: We offer the location notice of the Levi P.

192 Cross-examination.

By Senator BROWN:

Q. What is your business?

A. Mining.

Q. Any particular branch of mining?

A. Common miner.

Q. Only a common miner?

—. Anything that comes up in the shape of mining.

Q. You don't intend to be an expert miner?

A. No, sir.

Q. Or a mineral surveyor?
A. No, sir.
Q. Do you hold any position with any company?
A. Superintendent.
Q. Of what?
A. United States Mining Company.
Q. Have you ever been an engineer of any kind?
A. No, sir.
Q. Ever been in the habit of measuring your own claims?
A. Why, certainly.
Q. You generally measured them?
A. Yes, sir.
Q. You practiced some engineering in that way?
A. With a tape line; not with an instrument.
Q. Never used a transit?
A. No sir.
Q. Or compass?
A. Yes, used a compass.
Q. You used a pocket compass?
A. Yes sir.
Q. On this night in question, you determined what you intended to do before you went, did you?
A. Pretty much.
Q. Had you been over the ground on purpose so that you could see where you could put your stakes?
A. No, not on purpose to see where I could put my stakes—that is, you mean the stakes of the boundaries?
Q. You hadn't determined where you would put your stakes prior to the night you made your location?
A. Nothing only the discovery point.
Q. Had you determined the spot where you would put your discovery?
193 A. Yes, sir.
Q. When did you determine where you would put your discovery?
A. Some time in December, a few days before the first of the year.
Q. Why did you wait to determine that?
Objected to as irrelevant and immaterial.
A. Because the ground wasn't open for location at that time.
Q. Why wasn't it open?
A. It was owned by Dan Swan and some other parties.
Q. What location?
A. I can't call it at the present time.
Q. It was already located and occupied during the year 1888?
A. If they had performed the work it would be a *bona fide* location.
Q. It was occupied for the year 1888?

A. Yes, sir.

Q. And you anticipated their going out of existence?

A. Yes, sir.

Q. That was the idea?

A. That was the idea exactly.

Q. That is the reason you didn't make the location then and there when you made the discovery?

A. That was the reason.

Q. Of course, this night you couldn't see whether there was mineral in place there or not, could you?

A. No, I don't suppose you could.

Q. Could you? I know I couldn't. I ask you whether you could. There, on that night, in the moonlight. You couldn't tell mineral in place, could you?

A. No; I don't believe I could.

Q. It was only with the view of a prior discovery and the jumping of a prior location that you were there at midnight?

Judge STREET: We object to the word "jumping" as not
194 proper under the circumstances.

The COURT: Oh, I suppose the word jump may go out.

Senator BROWN: I would just as soon use the word relocation, if they think jumping is offensive.

(Senator BROWN:)

Q. I will ask the witness: Is the word "jump" offensive to you?

A. No, sir; not in the least.

Q. Then I will use the word relocate, as not offensive.

A. You can put it either way.

Q. You were there to take the place of somebody whose time you expected to expire?

A. Yes, sir.

Q. Whether you call it jumping or relocating; or whatever it was; and you couldn't at that time discover mineral?

A. Not only from the fact of knowing it was there from seeing it before.

Q. You couldn't at that time discover it, even if you did know. You couldn't see anything at all that night?

A. You could see rock.

Q. Could you see quartz, mineral—any ore?

A. Well, I expected there was mineral there.

Q. You did see mineral in the quartz that night?

A. No, sir; I didn't say so.

Q. You picked it up that night and saw it was quartz and you saw there was mineral in it?

A. No, sir; not that night.

Q. So far as you were concerned, you couldn't and didn't discover it that night, did you?

A. I knew of its existence.

Q. How?
A. As I said.
Q. You had seen it there before?
A. Yes sir.
Q. When had you seen it there before?
A. Because I was looking this particular ground up.
195 Q. When had you seen it there before?
A. Well, it wasn't over a week before the first of the year.
Q. You went up and looked it over?
A. Yes sir.
Q. You can't tell the name of Dan Swan's location?
A. I can't recall it now.
Q. But you were waiting for that?
A. Yes sir.
Q. On this particular night, at that place, you and your brother were there alone, were you? Anybody else?
A. Not that I know of.
Q. Your brother was there?
A. Yes sir.
Q. What time did you arrive at that place?
A. It must have been about a quarter to 12—half past 11 or a quarter to 12.
Q. When you arrived?
A. Yes sir.
Q. You put up a board?
A. Yes sir.
Q. What kind of a board did you put up?
A. Oh, it was a piece of board about 3½ or 4 feet long.
Q. Did you find it there when you went back a few days afterwards?
A. It was there for some time.
Q. How long was it there?
A. I couldn't say.
Q. Was there anything written upon it?
A. There was a notice on it.
Q. Did you take the board with you from down town?
A. No sir.
Q. Where did you get it?
A. I got it at the Telegraph.
Q. Telegraph office. Were you an officer of the Telegraph at that time?
A. No, sir; I stole it.
Q. You stole the board. Where did you get the notice, steal that too?
A. No, I wrote that.
196 Q. When?
A. Down town before I left.
Q. You didn't steal that from any good lawyer. You wrote that out yourself before you went, the day before?

A. That night, before I started out.
Q. But you stole your board, and you went up and stuck the board in at half past 11?
A. Yes sir.
Q. The- you didn't stop to stake your claim?
A. No sir.
Q. You went back to supper?
A. I believe I did have something to eat.
Q. Did you locate the Levi P. before you did the Veta?

(Judge STREET:)

Q. Did you state that you put the board there at half past 11—my attention has been called to the fact that the witness stated that he put the board there at half past 11——

(Senator BROWN:)

Q. Did you locate the Levi P. before you did the Veta?
A. It was located at the same time.

Judge STREET: I am told that the witness so testified. My recollection is not that way, but if he did, I should like to know and have the reporter read the question and answer.

The COURT: Mr. Street is not sure as to what the witness said, and he asks the privilege of reading from the record to correct his recollection.

Question and answer read by reporter, as follows:
"But you stole your board, and you went up and stuck the board in at half past 11?
A. Yes sir.

(Senator BROWN:)

Q. Were you present with your brother at the Veta?
A. No sir.
Q. Not there when he put——
A. (Interrupting.) No, sir.
197 Q. Didn't you go with him over there?
A. Yes sir.
Q. Where did you separate from him?
A. On the hill side right near the Levi P. discovery.
Q. Was he with you at the Levi P.?
A. We both landed there together.
Q. You stood together at the Levi P.?
A. Yes, sir.
Q. But you stood apart at the Veta?
A. I went down there with him.
Q. To the Veta discovery?
A. Yes, sir; showed him where to put his stake.
Q. What hour were you at the Veta discovery?
A. It was between the time——

Q. (Interrupting.) I don't care about between. What hour of the clock were you at the Veta?
A. Just a little before 12.
Q. You parted at the Veta, did you?
A. Yes, sir.
Q. Where did you meet again?
A. When he came back up.
Q. To the Levi P.?
A. Yes sir.
Q. You met on the Levi P.?
A. Yes sir.
Q. That is the place. Did you meet at supper?
A. No sir.
Q. How long were you apart?
A. At what time, do you mean?
Q. You said you parted from him that night when you were out there with him?
A. You have got two dates. Which time do you mean?
Q. That night of the location. Didn't you part with him that night?
A. Yes.
Q. How long were you apart?
A. Well, I don't know. It was several days, if this is the last parting you mean.
198 Q. You parted that night?
A. Yes sir.
Q. You started out—from where did you start?
A. Bingham.
Q. The city?
A. Yes sir.
Q. Where did you start from?
A. My home.
Q. You and he started out together—at what hour in the evening?
A. Somewhere a little after 11.
Q. And you parted in your excursion that night—or did you stay together all night?
A. We parted.
Q. You parted. When did you meet again after the partition?
A. When he came up from the Veta.
Q. You met again that night?
A. Yes sir.
Q. You were together when you came down the hill?
A. Yes sir.
Q. How long were you apart?
A. Probably half to three quarters of an hour.
Q. During what hours was that half or three quarters of an hour?
A. That was about 12 o'clock—around in that neighborhood.
Q. From half past 11 to half past 12 somewhere?
A. Somewhere around there.

Q. You were separated?
A. Yes sir; we were.
Q. At what point did you meet again?
A. After the separation—it was at the Levi P.
Q. Did he also take a board with him?
A. Yes sir.
Q. Both from the Telegraph?
A. Yes sir.
Q. Both notices wrote before you started?
A. I wrote both.
Q. One for him in his name, and one for yourself in your own name?
A. As to that I can't say. I think they were both in my name; I ain't positive.
Q. You didn't do any staking that night?
A. No, sir.
199 Q. You didn't do any surveying?
A. No sir.
Q. When did you stake it?
A. I can't exactly say the date, but it was within the time allowed——
Q. (Interrupting.) No; no; I don't want anything about that. Tell me about the facts.
A. I should say something like four or five or six days—something like that.
Q. And you staked one of the 1700 feet long. Which was that?
A. Both of them.
Q. And you say you measured them in length 1700 feet?
A. Yes sir.
Q. And your object was to cover the 1500?
A. Our object was to cover the 1500.
Q. Which 1500 did you intend to cover—the one to the east or the one to the west?
A. The one on the east.
Q. Why did you put on the extra 200 feet to the west?
A. We had to measure up over the ridge and down, and I put my stakes out so as to make sure that I was not short; that I would still have my 1500 feet.
Q. You knew you were staking 1700 feet?
A. I knew I was staking it out pretty well.
Q. You knew you were staking in 1700 feet?
A. No; I wasn't positive.
Q. Didn't you swear to that?
A. It measured 1700 feet.
Q. Then it wasn't an accident of yours in measuring 1700 feet.
A. We might not have measured it accurately.
Q. Have you measured it since?
A. No sir.
Q. Have you ever seen it measured since?

A. No sir.
Q. Have you been over it since?
A. Yes sir.
Q. Didn't you go and see it surveyed at the time it was surveyed for patent and protest?
200 A. No sir.
Q. Never saw it done?
A. No sir.
Q. Do you know where the stakes stand now?
A. No sir.
Q. You don't know?
A. No sir.
Q. Don't you know that it measures over 2000 feet?
A. No sir.
Q. But you made it enough?
A. I made it enough.
Q. And you intended to make it more than 1500 feet?
A. I intended to have 1500 feet.
Q. And more than 1500 feet. You knew you were going to make it more than 1500.
A. I knew I set my stakes out full 1500 feet.
Q. You knew you were making it 1700 feet?
A. I wasn't positive.
Q. Didn't you swear to Mr. Street that you were making it 1700, and that you knew that?
A. We measured 1700 feet; but let me tell you why we made it that long. We had to go down over a gulch and up over a ridge.
Q. You say you knew you measured out 1700 feet?
A. Yes; I knew we measured out 1700, according to our tally.
Q. There you set your stake. That was the midnight between December 31st 1888, and January 1st, 1889?
A. Sir?
Q. That was between December 31st, 1888, and January 1st, 1889. It was in the night between those two days?
A. We were on the ground in 1888, and we were on the ground in 1889.
Q. It was during that night you were operating?
A. Yes, sir.
Q. And you made your staking four or five days after?
201 A. Something like that.
Q. Where did you get your stakes?
A. Got them of George E. Chandler.
Q. Pay for them?
A. I suppose so; had them charged.
Q. Did you have them marked?
A. Yes sir.
Q. How?
A. With lead pencil.
Q. What?

A. Stating what they were.
Q. What was it they stated. What was the mark on them?
A. Stating the corner.
Q. Stating what corner?
A. Whatever one we set, stating the corner of the Levi P. or Veta. That was all.
Q. Did you yourself put them?
A. Myself and brother.
Q. Went up and measured it and put them in. Every do any work on that ground?
A. Yes sir.
Q. When?
A. 1890.
Q. How much work did you do in the Levi P. in 1890?
A. Done $100 worth of work.
Q. Whereabouts?
A. Why, up on the ridge.
Q. Tunnel, shaft or open cut?
A. We cleaned out an old incline shaft and sunk it down some.
Q. Is that all the work you have done?
A. No sir.
Q. Go on; tell what you did?
A. We ran a couple of open cuts there.
Q. How big, and where did you run them?
A. In 1890—some time during 1890.
Q. Is that the last work you did?
A. No sir.
Q. Go on; tell the work you did?
A. We started a tunnel down on the Revere side of the claim in 1890.

Q. Did you ever do any work after 1890?
202 A. In 1892 A. M. Spooner done some work there.
Q. How much?
A. He drove a tunnel about 125 feet or 130 feet.
Q. After 1892, anybody do any work?
A. Yes sir.
Q. Who and what?
A. In 1896 I paid for work there.
Q. What work did you have done in 1895?
A. Drove a tunnel toward the incline shaft.
Q. On the Levi P.?
A. Yes sir.
Q. How much of a tunnel?
A. I can't say just now. I paid for $100 worth of work at that point.
Q. Is that the last work you did?
A. No.
Q. Go, on; tell what it was?
A. In 1896 I paid for work.

Q. How much?
A. $100 on the Levi P.
Q. To whom?
A. That was to the Stockdale Brothers.
Q. Where was the work done?
A. In this same tunnel.
Q. 1897—any?
A. No sir.
Q. Have you examined that map to see whether that is correct so far as the Levi P. is concerned?
A. I couldn't say whether that is correct or not.
Q. Do you say yes, or no?
A. I can't say whether it is correct or not.
Q. Haven't you been advised about this map?
A. No, sir.
Q. You have not?
A. I never looked at it until I saw it there.
Q. Ain't you interested in this law suit?
A. No, sir.
Q. Wasn't you interested in it yesterday?
—. No, sir.
Q. Not in any way interested in this—in the Yes You Do.
A. No, sir.
203 Q. Never interested in that in any way?
A. In no shape nor form.
Q. No expectation of getting stock?
A. No sir.
Q. You have been busy about it, haven't you.
A. No, sir; any more than I have been considered a witness for the parties.
Q. Subpœna-d here regularly?
A. Yes sir.
Q. Paid your fee?
A. I haven't had a cent yet.
Q. Who has subpœnaed you?
A. Mr. Lavagnino.
Q. Did he promise you your fees?
A. He didn't say.
Q. You took his looks for it?
A. I expect he will pay up; I don't know.
Q. Did he have a subpœna served on you, or did he just ask you?
A. He just sent me a copy—handed me a copy.
Q. Did you ever measure the distance from this point where you put your board notice to the northeast end?
A. Not commencing at the discovery and measuring—no.
Q. You measured the whole distance, but not that part of it?
A. Not that part of it.
Q. How far would it be?

—. I don't know. 800 or 900 feet, I guess.

Q. To the northeast end. And how far to the southwest end?

A. Well, that was short, I think; it was about 700 feet—750, something like that. The long end was to the east.

Q. But you had it 1700 feet long by measurement?

A. Yes sir.

Q. It was 800 feet to the east.

A. 800 or 900 feet to the east.

Q. You say it is 1700 feet measured; that would make it 900 to the east?

A. 800 one way.

Q. And how much the other? You say it is 800 to the west. Isn't that correct?

A. I can't say.

204 Q. Well, I have only your word for it. When you did measure the 1700 feet, didn't you measure along to know which way from the discovery you went, how much each way?

A. We didn't start at the discovery to measure.

Q. Where did you start from?

A. From the west end line.

Q. Measured to the east?

A. Yes sir.

Q. Then you came 1700 feet?

A. Yes sir.

Q. You can't tell how much was to the west and how much to the east of the discovery point?

A. Well I think there was about 750 feet to the west.

Q. And 800 or 900 or 1000——

A. To the east.

Q. I thought you said 800 to 900 to the east a while ago. Didn't you say 800 to 900?

A. I don't think I put it just exactly that way—somewhere in that neighborhood.

Q. 800 to 900, wasn't it? You won't say that wasn't what you stated half a minute ago?

A. Somewhere in that neighborhood.

Judge STREET: In view of the cross-examination, I want to ask a question or two.

Re-direct examination.

By Judge STREET:

Q. You stated that in measuring the 1700 feet you measured up and down, did you not?

A. Through a gulch and up the side hill and down the other side.

Q. Do I understand you that you didn't measure on a level plane?

A. The ground wasn't level—no.

Q. And did you realize at that time that you were entitled to 1500 feet on the level?

A. Yes sir.

Q. Mr. Brown at one time in his questions stated substantially this: That you stole your board and stuck it in at half past 11. Did you stick your discovery board in at half past 11?

205 A. No, sir.

Q. Did you understand his question with respect to that?

A. I didn't understand his question, that I stuck the board in at half past 11.

Q. When did you stick your board in?

A. About five to ten minutes after 12 o'clock.

Judge STREET: We now offer the Levi P. location notice.

Senator BROWN: We object to it as immaterial, and not rebutting. It wouldn't be rebutting unless it met some issue we tendered; it is not material unless it pertains to the ground in controversy. As I understand this—I may be mistaken—this doesn't affect our location at all. It assumes to take in some little part of the land, but doesn't touch the discovery point—although I may be mistaken about that, but I am so told. I am told that it is marked out right there, and that they don't assume that this Levi P. touches the discovery of the Uhlig, either one of them. It doesn't take in the discovery of the Uhlig does it?

Judge STREET: It appears by your map.

Senator BROWN: Well by your map.

Judge STREET: No; the Levi P. doesn't touch the discovery as shown on the map; but it does touch the area in conflict to the entire extent of the area.

(Objection argued to the court at length by respective counsel.)

The COURT: I suggested early in the trial of the case that before the court passed upon the validity of the location notice of the Yes You Do, the whole proceedings in the land office, the adverse claim, be put in evidence, with a view of having the case as an entirety

206 go up before the supreme court, in order that the whole matter might be settled, but the suggestion of the court was not concurred in, and the case is now in its present condition.

The view I take of the law is this: That in this case, it stands now as though the applicants for patent had posted their notice and diagram upon the claims pending patent proceedings for these claims in the land office; that the register, upon the incoming of the proof of posting the notice and map of the claims, published notice of the application of these parties for a patent to these claims; that no adverse claim has been filed, though through the peculiar conditions which have arisen in the trial of this case, the plaintiff, who claims to be the owner of the Yes You Do claim, also claims that he did file an adverse claim to this application for patent but on account of the invalidity of the location notice of the Yes You Do and the reason that the locator of the claim was disqualified,

being a deputy United States mineral surveyor, and couldn't initiate any title by anything he might do with reference to making a location of the Yes You Do, the location notice has been rejected as evidence. Now, that being so, the application for a patent being unchallenged, the assumption of the law is that the applicants are entitled to patent their claims as applied for, and third parties will not be permitted to question the validity of the proceedings to obtain patent, or make any objections, except to show that the applicants for a patent have not complied with the law. The Eureka case, decided in the 4th Sawyer—I don't remember the name of it—commonly known as the Eureka case—in that case Judge Field held that when a party made an application for a patent, any
207 adverse claimant failing to file his adverse claim within the sixty days' period of publication, in which he asserted or, rather, defined, the nature and boundaries and extent of his adverse claim, that he would be held to waive it. And as no adverse claimants are before the court to any part or any portion of the land embraced within the Uhlig No. — and the Uhlig No. 2 claims as surveyed and applied for, I don't think the location notice of any adjoining or conflicting claim could be heard to determine the right of the applicants to a patent in this case. And looking at the law in this way, I will rule out the location notice of the Levi P.

Judge STREET: I wish the record to show that the ruling of the court is made upon section 2326 and the supplemental act of March 3rd, 1881, of the United States Statutes.

The COURT: As to the supplemental act referred to, the court holds that it doesn't apply, for the reason that there is no contest between adverse claimants.

Judge STREET: We note an exception to the ruling.

(Location notice Levi P. marked for identification by reporter, "X—J. W. P.")

208 GEORGE A. SMITH, sworn for the defense.

Examination by Mr. CRITCHLOW:

Q. You are the receiver of the land office in this city?

A. Yes sir.

Q. You have with you the application papers for patent by the St. Joe Mining Company for the Uhlig No. 1 and the Uhlig No. 2 locations?

A. I don't know until I look at them.

Q. Made by Mr. Edmund H. Uhlig?

A. Yes sir.

Q. And Alexander McKernan?

A. Yes, sir; I have the application papers here.

Q. Included in those application papers see if you find an affidavit of citizenship of Edmund H. Uhlig?

A. Yes sir.

Q. This was filed with the other papers, was it, as shown by the file mark of your office?
A. Yes sir.

Mr. CRITCHLOW: We offer this in evidence.
Judge STREET: We object to it as not the best evidence as incompetent. The affidavit is as follows: (reading same.)

"*Affidavit of Citizenship—Naturalized.*

"STATE OF UTAH,
"*County of Salt Lake,* } ss:

"Edmond H. Uhlig, being first duly sworn according to law, on oath deposes and says: he is over the age of 21 years; that he has applied for a patent for the Uhlig Lode No. 1 and the Uhlig Lode No. 2 mining claims situated in West Mountain mining district, county of Salt Lake and State of Utah; that he was born in Germany, in Prussia, in the year 1842, and he is a naturalized citizen of the United States of America; that he took out his final naturalization papers in the district court at Salt Lake City, Utah, on or about the — day of January, 1892, and is now a resident of Bingham Utah.

(Signed) EDMOND H. UHLIG.

Subscribed and sworn to before me this 10th day of August 1898.

L. H. CARR."

With the signature and seal of L. H. Carr, notary public. "Filed August 17, 1898."

Judge STREET: We submit that it is incompetent, there being better proof; that the certificate of naturalization is the best evi-
209 dence.
Senator BROWN: We offer it simply because it falls exactly within the decision of Judge Field in the Hammer against Garfield case. (Citing decision referred to)
The COURT: I understand the rule to be as you contend, and will overrule the objection.
Exception by counsel for plaintiff.
Mr. CRITCHLOW: We offer also the affidavit of citizenship of Alexander McKernan.
Same objection. Same ruling. Exception by plaintiff.
Mr. CRITCHLOW: This is the original, so I will read it into the record. (Reads:)

"*Affidavit of Citizenship—Native Born.*

"STATE OF UTAH, } ss:
County of ——. }

Alexander McKernan, being duly sworn, says: That he is an applicant for patent for the Uhlig Lode No. 1 and Uhlig Lode No. 2 mining claims, situated in the West Mountain mining district, in Salt Lake county, Utah; that he is a native born citizen of the United States, born in the county of Lucas, State of Ohio, in the year 1847, and is now a resident at Salt Lake City, Utah.

(Signed) ALEXANDER McKERNAN.

Subscribed and sworn to before me this 16th day of August, 1898.

F. W. QUINN,
[NOTARIAL SEAL.] *Notary Public.*

The record may show that the last affidavit also comes from the patent application papers produced by Mr. Smith, the receiver of the land office.

Judge STREET: We take an exception. In view of the ruling of the court, we desire to make an offer at this time. I understand the ruling of the court is that we have no standing whatever to prove that the ground occupied or any portion of it occupied by the Uhlig No. 1 and No. 2, was at the time they were located validly possessed by persons holding antecedent valid locations under the mineral laws of the United States.

210 The COURT: Yes sir.

Judge STREET: We offer, in view of the ruling of the court to prove that the Veta Lode claim was located immediately after midnight on the morning of the 1st of January, 1889, by Andrew Mayberry and Charles Mayberry, and that it covered——

The COURT: You may take any steps that you desire to present this whole question for consideration before the supreme court, and the court doesn't rule that you can't do that at all. I am simply announcing my construction of the law upon the facts before the court.

Judge STREET: We will offer to show that the Veta claim was located as I have specified, and that the area staked out and the area occupied by the Veta claim covered the discoveries of both the Uhlig No. 1 and Uhlig No. 2 claims as shown upon the maps filed upon the application for patent in the United States land office, and that this claim was filed for record January 1st, 1889, at 2:15 a. m. at a time antecedent to the filing for record of either the Uhlig No. 1 or the Uhlig No. 2 claims. We also offer to show that the Levi P. claim was filed for record January 1st, 1889, at 2:15 o'clock a. m., and that

the Veta claim was staked out within a reasonable period, and that a discovery of mineral was made—mineral bearing rock in place at the point of discovery stated in the location notice.

The COURT: In other words, you desire to offer proof to show a valid, subsisting location of the Veta at the time that the Uhlig No. 1 and the Uhlig No. 2 were attempted to be located?

Judge STREET: That is the proof that we offer.

211 The COURT: In the position which the court has taken in the admission and rejection of testimony and the construction of the law, the facts might be as you contend, but still having failed to put in your adverse claim within the prescribed period, and defining the extent and boundaries of your claim, so far as these two locations are concerned, the Veta and the Levi P., whatever right the parties may have was waived by failure to properly adverse the application for patent by the defendant.

Judge STREET: The evidence is excluded?

The COURT: Yes, sir.

Judge STREET: We note an exception.

Mr. SONNEDECKER: With the permission of the court, I will, as a friend of the court and on behalf of the Government in view of the evidence produced concerning the Levi P. and Veta locations, offer in evidence the Levi P. and the Veta location notices, in support of the contention that the Uhlig No. 1 and Uhlig No. 2 were not located, at the time they were located, on vacant, unappropriated mineral lands of the United States. I now offer to raise, with the court's permission, on behalf of the Government and as a friend of the court—to raise the question that your honor desired raised.

Mr. CRITCHLOW: We raise the same objection as to its materiality, and the further objection that this court has no jurisdiction to listen to and decide an issue of this kind; that is not a jurisdiction given to this court, the United States not being before it in that sense.

The COURT: I will sustain the objection. I passed on that before, and the court will sustain the objection as now made to the

212 offer, as well coming from the friend of the Government or of the court as from the plaintiff. The idea of the court seems to have been misapprehended by Mr. Sonnedecker. My idea was, in the way I suggested it, to try the case practically upon what might be considered the merits—the patent proceedings, and the so called adverse claim and such proceedings in the land office, and let the question of the validity of the location notice of the Yes You Do come up at the close of the case, in order that all the facts and the questions of law upon the facts might go before the supreme court, so that from the — that court might be able to direct a different judgment from the one that this court might make if the (the supreme court) found that I was wrong in my construction of the laws of Congress applicable to the facts involved. But as that suggestion was not concurred in, of course it cuts no figure in the case now. Mr. Reporter will you read Mr. Sonnedecker's offer.

(Offer of Mr. Sonnedecker, as found on preceding page read by reporter.)

Mr. SONNEDECKER: I think there was something the reporter didn't catch. I intended to say, and did say, as I thought, that I believed Judge Street had accepted both positions, and expected to make the offer both on behalf of the plaintiff and the Government, until your honor ruled on his offer concerning the Levi P. location notice.

Judge STREET: I only desire to act for the plaintiff in this matter. I expressly this morning reserved all my future actions for the plaintiff. I don't want to be considered as appearing for the Government. I appear for the plaintiff.

213 The COURT: Proceed with the case.

Mr. SONNEDECKER: Note an exception.

Judge STREET: From what your honor has said, I don't think there is any case here. As I understand it, your honor substantially ruled that when our location notice of the Yes You Do was ruled out as invalid, we had nothing to do but simply to rest our case and be referred to the land office. We have gone on in a perfectly supernumerary manner. I don't suppose your honor will make a finding that this was a valid location. In view of the ruling, we have no further standing here.

Mr. CRITCHLOW: We rest.

Conclusion.

214 STATE OF UTAH, } ss:
County of Salt Lake, }

I, J. W. Pike, court stenographer of and for the third judicial district court (division No. 1) Salt Lake county, State of Utah, hereby certify that on 25th and 26th days of March, 1901, I reported stenographically all the testimony and proceedings had in the trial of the cause of Giovanni Lavagnino, plaintiff, *v.* Edmund H. Uhlig *et al.*, defendants; and I further certify that the foregoing annexed type written matter, consisting of 136 pages, is a correct transcript from my official stenographic notes of the testimony and proceedings reported by me as aforesaid.

J. W. PIKE,
Court Stenographer Third District Court
(*Division No.* 1), *State of Utah.*

215 *Notice of Location.*

Notice is hereby given, that the undersigned, having complied with the requirements of section 2324 of the Revised Statutes of the United States, and the local laws, customs and regulations of this district, has located fifteen hundred feet in length by 600 feet in width, on this the Yes You Do lode, vein or deposit, bearing gold,

silver and other precious metals situated in West Mountain mining district, Salt Lake county, Utah, the location being described and marked on the ground as follows, to-wit:

Commencing at cor. post No. 1 identical with the south east corner of the No. You Don't lode U. S. lot 99, and running thence north easterly 1500 ft. to cor. No. 2 identical with the north east corner of the No You Don't lode U. S. lot 99; thence southeasterly (600) feet to corner post No. 3; thence southwesterly (600) feet to corner post No. 4; thence northwesterly (600) feet to place of beginning, including all dips, spurs, angles and variations.

This claim is a relocation of the Levi P. claim and is situated on the southeasterly slope of a high mountain ridge and bears south easterly (2.600) feet from the fork of main Bingham canyon and Bear gulch. The discovery is close to a prominent outcrop near the center of this claim. The four corners of this claim are permanently set and marked.

The mining claim above described shall be known as the Yes You Do lode, located this first day of January, 1898.

Names of locators.

J. FEWSON SMITH, JR.

Recorded January 3rd 1898. at 10:21 a. m. at the request of J. Fewson Smith, Jr., Abstracted in Book "G" of Mining Abstracts, page 199.

J. C. JENSEN,
County Recorder,
By AUGUST STEIN, *Deputy.*

(Duly certified.)

(Z—J. W. P.)

216 Entry No. 123,053.

This indenture, made the fifth (5th) day of September in the year of our Lord one thousand eight hundred and ninety-eight, between J. Fewson Smith, Jr., of Salt Lake City, Salt Lake county, Utah, the party of the first part, and G. Lavagnino of the same place, the party of the second part, witnesseth:

That the said party of the first, for and in consideration of the sum of one dollar, of the United States of America, to him in hand paid, by the said party of the second part the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, release, remise and forever quitclaim unto the said party of the second part, and to his heirs and assigns for ever, all the right, title and interest, estate, claim and demand, both in law and in equity, as well in possession as in expectancy, of the said party of the first part, of, in or — that certain portion, claim and mining right, title or property on a certain vein or lode of rock, contain-

ing precious metals of gold, silver and other precious metals and situate in the West Mountain mining district, Salt Lake county, Utah, and described, as follows, to-wit:

Beginning at corner No. 1, identical with the southeast corner of the "No You Don't" lode U. S. lot 99, running thence northeasterly 1500 feet, thence southeasterly 600 feet, thence southwesterly 1500 feet, thence northwesterly 600 feet to corner No. 1 the place of beginning, said claim known as the "Yes You Do" lode.

Together with all the metals, ores, gold and silver bearing quartz rock and earth therein; and all the rights, privileges and franchises thereunto incident, appendant and appurtenant, or therewith
217 usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereto belonging, and the rents, issues and profits thereof; and also, all the estate, right, title, interest, possession, claim and demand whatsoever, of the said party of the first part, of, in or to the premises, and every part and parcel thereof.

To have and to hold all and singular, the premises, with the appurtenances and privileges thereto belonging, unto the said party of the second part.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

J. FEWSON SMITH, JR. [SEAL.]

Signed, sealed and delivered in the presence of
N. W. SONNEDECKER.

UNITED STATES OF AMERICA.

STATE OF UTAH, } ss:
County of Salt Lake, }

On the 17th day of October, A. D. one thousand eight hundred and ninety-eight, before me, a notary public in and for said Salt Lake county, duly commissioned and qualified, personally appeared the within named J. Fewson Smith, Jr. whose name is subscribed to the foregoing deed of conveyance as grantor therein personally known to me to be the identical person mentioned in, and who executed the same, and duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[SEAL.] ALVIN V. TAYLOR,
Notary Public.

My commission expires Ap'l 3, 1900.

218 Recorded October 17, 1898, at 4:15 o'clock p. m. at request of grantee in Book "Q" of mining deeds, at page 227, records of Salt Lake county, Utah, recording fee paid 1.50. Abstracted G page 199 line 21.

J. C. JENSEN,
County Recorder,
By AUGUST STEIN, *Deputy.*

(Duly certified.)
(J. W. P. Y.)

218½ In the Third Judicial District Court, in and for the County of Salt Lake, State of Utah.

GIOVANNI LAVAGNINO, Plaintiff,
vs.
EDMUND H. UHLIG ET AL., Defendants.

The above and foregoing, together with the exhibits referred to, constitute all the evidence given or offered on the trial of said action.

That thereafter on the 18th day of December, 1901, said court made and filed its findings of fact and conclusions of law herein, and entered its decree herein.

That thereafter, on the 26th day of December, 1901, the plaintiff made and served a motion to set aside the decision of said court herein, and grant a new trial for the following reasons.

1. Insufficiency of the evidence to jusify the decision, and that the decision is against law.

2. Errors in law occurring at the trial, excepted to by the plaintiff.

Said motion was based upon the files and minutes of the court in said cause.

That thereafter, on the 6th day of January, 1902, said court in said cause entered an order denying plaintif-'s said motion for a new trial.

The above and foregoing bill of exceptions having been duly prepared and served upon all the parties hereto, within the time
219 allowed by law, and having been agreed upon by the parties hereto as true and correct, the same is hereby settled, allowed and made of record herein.

Dated this 13th day of April, 1902.

WM. C. HALL, *Judge.*

The above bill of exceptions as prepared is correct, but this stipulation is given without waiving any right to object to the same as not being served settled and filed in time.

PIERCE, CRITCHLOW & BARRETTE,
Attorneys for Defendants.

April 11, 1902.

220 In the Third Judicial District Court in and for the County of Salt Lake, State of Utah.

GIOVANNI LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } Petition Assigning Errors.

Now comes the plaintiff and appellant in the above entitled action and assigns the following errors for the ground of reversal herein :

Errors in law occurring at the trial and at the time duly excepted to by the appellant.

1. The court erred in rejecting the notice of location of the " Yes You Do " mining claim.

2. The court erred in rejecting the deed conveying said " Yes You Do" mining claim from J. Fewson Smith to G. Lavagnino, the plaintiff.

3. The court erred in refusing to permit the plaintiff to prove that the plaintiff duly filed in the United States land office a protest and adverse claim in respect to the area in conflict between the " Uhlig No. 1 " and the " Uhlig No. 2 " Lode mining claims, and the " Yes You Do " Lode mining claim, and that within thirty days of the time of the filing of the said protest and adverse claim, plaintiff commenced this action in this court to determine the right of possession of the area in conflict between said claims.

4. The court erred in refusing to permit the plaintiff to prove that, at the time the " Uhlig No. 1 " and the " Uhlig No. 2 " claims were located, there was a subsisting, valid location, known as the " Levi P." location, also a further subsisting, valid location, known as the " Veta " location ; and that said " Levi P." location covered all of the area in conflict between the " Yes You Do " and the " Uhlig No. 1 " and the " Uhlig No. 2 " Lode mining claims.

221 5. The court erred in rejecting evidence offered by the plaintiff to show that the necessary annual labor to maintain the said " Levi P." mining claim was performed up to and including the year 1896, and that in the year 1897, previous to the location of the " Yes You Do," the owner of the " Levi P." mining claim abandoned all rights to said claim and failed to perform any labor thereon for the year 1897.

6. The court also erred in refusing to permit the plaintiff to prove that the " Veta " Lode mining claim was a prior location to the " Uhlig No. 1 " and the " Uhlig No. 2 " mining claims—a valid location at the time of the location of the said " Uhlig No. 1 and No. 2 " Lode mining claims, and included the discoveries of each of said claims, the " Uhlig No. 1 " and the " Uhlig No. 2."

7. The court erred in refusing to permit the plaintiff to prove that he had performed the annual labor required by law upon the " Yes You Do " mining claim for the years 1899 and 1900.

8. The court erred in rejecting proof offered by the plaintiff that the title of the "Yes You Do" mining claim had passed from J. Fewson Smith, Jr., to Giovanni Lavagnino, prior to the time of the filing of the protest and adverse claim.

9. The court erred in failing to permit the plaintiff to prove that the plaintiff and his grantor have, since the time of the location of the "Yes You Do" mining claim, complied with the laws and the rules and regulations of the United States, of the State of Utah, and of the West Mountain mining district, so as to entitle the plaintiff to the possession of the "Yes You Do" Lode mining claim, including the conflict area between the "Uhlig No. 1" and the "Uhlig No. 2" and the said "Yes You Do."

10. The court erred in finding that plaintiff introduced no legal or competent evidence upon the trial of this cause to sustain the issues thereof in his behalf.

11. The court erred in dismissing the plaintiff's complaint herein.

12. The court erred in rendering its decision in favor of defendant- and against plaintiff herein.

222 In the Supreme Court of the State of Utah, Regular October Term, October 16, 1902.

GIOVANNI LAVAGNINO, Appellant,
v.
EDMUND H. UHLIG ET AL., Respondents. } Submission.

This cause coming on regularly for hearing was argued by Mr. N. W. Sonnedecker and Hon. C. C. Dey in behalf of the appellant, by Hon. E. B. Critchlow in reply, was submitted, and by the court taken under advisement.

Judgment.

Title of court and cause.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, that the judgment of the court below be, and the same is hereby, affirmed, with costs.

223 In the Supreme Court of the State of Utah.

GIOVANNI LAVAGNINO, Appellant,
v.
EDMUND H. UHLIG and ALEX. MCKERNAN, Respondents. }

The defendants, Edmund H. Uhlig and Alex. McKernan, on or about the 24th day of August, 1898, made an application in the

United States land office at Salt Lake City, for a patent for the Uhlig No. 1 and Uhlig No. 2, mining claims. The plaintiff, in due time, filed in the said land office, an adverse claim to a portion of the said Uhlig No. 1 and No. 2, which overlapped and included a part of the 'Yes You Do' mining claim. Thereupon further proceedings on said application were stayed in the land office, and the plaintiff in due time instituted this action to determine, as provided in section 2326 of the Revised Statutes of the United States, the right to the possession of the portion of the Uhlig Nos. 1 and 2 which conflicts with the 'Yes You Do.'

It appears from the record that the summons in respect to the defendant Alex. McKernan was quashed, and the action as to him was discontinued; that pending the action, which was not dismissed as to the co-defendant, Edmund H. Uhlig, and before the trial, he conveyed his interest in the Uhlig Nos. 1 and 2 to the St. Joe
224 Mining Company, a corporation, organized under the laws of the State of Utah, and said company was substituted as defendant in place of the said Edmund H. Uhlig. The trial court adjudged and decreed that the St. Joe Mining Company and the said Alex. McKernan are the owners in possession, and entitled to the possession, except as against the paramount title of the United States, of the premises in dispute (which was described in the decree by metes and bounds) and that the defendant recover its costs, etc. From this decree the plaintiff has taken an appeal.

It appears from the testimony of J. Fewson Smith, Jr., a witness for the plaintiff, that he located the 'Yes You Do' on the 1st of January, 1898; that at that time and at the time of the trial he was a deputy United States mineral surveyor "attached to the office of the surveyor general of the district of Utah;" that he had an interest in the litigation; that between the time of making said location and the time of filing the protest in the land office by the plaintiff he agreed with plaintiff to convey to him the 'Yes You Do' mining claim for the consideration of one dollar, and the sum of six hundred dollars, the future payment of which depended upon the conditional stipulations, the substance of which is as follows: If a patent for said claim should be obtained without litigation Lavagnino, the plaintiff, was to pay $600, but if there was litigation through any source, in respect to said claim, and a failure to procure patent for the same, then no part of the $600.00 was to be paid for the conveyance. In case there was such litigation then the said Smith was only to be paid said sum less the expense of patenting the claim, if one should be obtained, but if a patent was only obtained for a small triangle, or part of the claim, the plaintiff might refuse to pay the remainder of the consideration. In pursuance of the foregoing agreement the claim was deeded to the said plaintiff by
225 Smith but the only consideration named therein was the sum of one dollar.

The said Smith also testified that "when he transferred the ground to Lavagnino it was for the purpose of defeating these

other claims and not with a view of making much;" and having further testified that he made the plat showing the conflict in question in this case, he was asked, on cross-examination, the following question: "Isn't it a fact that you being a deputy United States mineral surveyor, couldn't make the survey and protest for your claim if you held it in your own name, and you consequently turned it over to Mr. Lavagnino?"

A. "It is a fact that I couldn't make the protest in my own name while I held an interest in the claim."

After the disclosure of the foregoing facts the plaintiff offered in evidence a certified copy of the location notice of the 'Yes You Do,' and in connection therewith the deed to Lavagnino. To this offer the defendant objected upon the grounds, which in substance, were as follows: That by the testimony of the witness J. Fewson Smith, Jr., it appears that said mining claim was not located by a person who had the power, under the act of Congress, to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned, January 1st, 1898, a deputy United States mineral surveyor for Utah, and, therefore, incompetent to make locations; that in this particular action it now appears that the witness, at the time he made the protest map, plat and the survey, fixing the boundaries for the purpose of an adverse claim and protest introduced in the land office, was himself a deputy United States mineral surveyor, interested in the action, as he himself has stated, therefore the location itself was in violation of the law, and could not be the basis either of a valid location in himself or a deed to anybody.

226 The trial court excluded the said notice and deed on the ground that "J. Fewson Smith, Jr., the locator of the claim was prohibited from making the location of a lode mining claim, and therefore had not the qualifications to initiate any title by any act that he did with reference to locating the 'Yes You Do' mining claim. The plaintiff after duly excepting to the ruling of the court rested. The defendant then proceeded to introduce evidence in support of the validity of the Uhlig Nos. 1 and 2 mining claims, after which, in rebuttal, the plaintiff offered to show that the "Levi P." and 'Veta' mining claims, at the time of the location of the Uhlig Nos. 1 and 2, were valid and subsisting claims and covered the discoveries of both the Uhlig No. 1 and No. 2, and were then owned by Andrew P. Mayberry.

Mr. Sonnedecker, an attorney of the plaintiff, offered to make the same showing "on behalf of the Government and as a friend of the court." Defendant's counsel objected to this on the ground that it was immaterial; "that the court was without jurisdiction to listen to and decide an issue of that kind, the United States not being before the court in that sense."

The trial court sustained the objection on the ground that as no adverse claim, based upon the 'Levi P' and 'Veta' claims had been made within the prescribed period, whatever rights the parties may

have had to said claims were waived by failure to properly adverse the application for a patent by the defendant.

It does not appear from the record that any adverse claim, whatever, based upon the 'Levi P' or 'Veta' was made in the land office, in the matter of the defendant's application for a patent of the Uhlig Nos. 1 and 2; nor does the plaintiff claim any interest in said mining claims.

227 After stating the facts, BASKIN, C. J., delivered the opinion of the court.

1. The refusal to permit the certified copy of the location notice of the 'Yes You Do,' and the deed offered in connection therewith, to be introduced in evidence, and the rejection of the evidence relating to the 'Levi P' and 'Veta' mining claims, is assigned as error.

Sec. 452, U. S. Rev. Stat. provides: "The officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

Subsequent to the enactment of this section, sec. 2319 of the U. S. Rev. Stat. was passed, and is as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are not inconsistent with the laws of the United States."

The former section has been retained in all of the revisions of said statutes made since its enactment.

These sections are therefore in *pari materia* and must be construed together, and if possible, made to harmonize and not to violate the general public policy which, it is evident, the former was enacted to prevent. 1 Kent, Comm., (13 ed.) p. 464; Manuel *v.* Manuel, 13 Ohio St. 458, 464–'5.

228 The presumption is that Congress, when the latter section was passed, was aware of the existence of the former, and acted in view of that fact. As the former section has not in terms been repealed, but has been retained in each of the revised editions of the U. S. Statutes it must be presumed that Congress intended it to remain in full force notwithstanding the provisions of the latter section; or, in other words, it was the intention of Congress to prohibit, on the ground of public policy, the officers, clerks, and employees in the General Land Office from acquiring, directly or indirectly, an interest in the purchase from the Government, any of the public land of the United States.

It is clear from the testimony of J. Fewson Smith, Jr., in this case,

that his right to the unpaid consideration for the conveyance of the 'Yes You Do' was wholly dependent upon the purchase or entry, of the same, and to that extent he was interested in the entry, or in the purchase, which is the same as an interest in the entry, sought by Lavagnino. One dollar is the only consideration actually paid by Lavagnino to Smith. Both of the parties at the time anticipated litigation. Smith, in addition to his testimony before referred to, stated: Somebody would have to stand the expense of the litigation if there was any, and since I could not make a sale to Mr. Lavagnino out and out I just let him take it at his own terms with the understanding that if the claim was given to him clear, that is, if there was litigation through any source and he got the claim through for patent clear then I was to receive in addition to what I got that day a certain sum of money. This arrangement was in 1898, between the time of making the location and the time of entering the protest. It would be somewhere about the middle of the summer I should think. I received one dollar in cash. That was to bind the bargain. If he doesn't get the ground I get nothing further."

229 Before making the adverse claim and bringing this suit Lavagnino knew that Smith was a deputy U. S. mineral surveyor, for Smith, as such, made the survey and plat filed in the land office with the adverse claim, so that, if sec. 452 includes deputy mineral surveyors, Lavagnino, before expending any sum except one dollar, was at that time advised of the fact, if he was not before, that his agreement with Smith was in violation of the provisions of said section, and that the conveyance of the 'Yes You Do' for that reason was unvalid.

The latest decisions of the Secretary of the Interior hold that under sec. 452, R. S. U. S., "A deputy mineral surveyor, while holding such office, is disqualified as a mineral entryman."

Floyd *v.* Montgomery, 26 L. D. 122.

Frank A. Maxwell, 29 L. D. 76.

Our attention has not been called to any decision of a court touching the question, and while the decisions of the Land Department, on matters of law, are not binding upon the courts they should not be overruled except when they are clearly erroneous. Hastings & Co. *v.* Whitney, 132 U. S. 357–366 and cases there cited.

We think that the section in question includes mineral surveyors and prohibits them, as held by the Land Department, from entering any of the public lands, while they are such deputies, and also from directly or indirectly, acquiring any interest in the purchase from the Government of the same. It follows, that as J. Fewson Smith, Jr., while he was a deputy mineral surveyor, was prohibited by said section from entering a mining claim or directly or indirectly acquiring any right or interest in the purchase from the Government of such a claim. He was also prohibited at that time from doing any of the acts, upon the performance of which, under the

provisions of the mining law of 1872, the right of making an
230 entry, or purchase from the Government, depends, and that his location of the 'Yes You Do' was therefore void, and Lavagnino acquired no rights under the deed to him of the same.

The failure of the plaintiff to show, in chief, any right to the premises in controversy disclosed the fact that he was "a stranger to the title" of the premises in dispute, and that a non-suit could, on motion, have been properly granted. So that a failure to establish the defendant's claim could in no way benefit him or validate his alleged title to the 'Yes You Do.' Therefore the plaintiff had no more interest in, or right to further contest the defendant's claim, on the ground that the 'Levi P' and 'Vesta' were valid and subsisting claims, than the said Andrew P. Mayberry himself, or any other stranger had.

Sec. 2325, U. S. Rev. Stat. provides that: "If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

In the case of The Eureka Min. Co. *v.* The Richmond, 9 Morrison's Min. Rep. 578 (4 Sawyer, 362), it was held in the opinion delivered by Mr. Justice Field that "Under the mining act of 1872, where one is seeking a patent for his mining location, and gives the prescribed notice, any other claimant of an unpatented location objecting to the patent on account of extent, or form, or because of asserted prior location, must come forward with his objections and present them, or he will be afterwards precluded from object-
231 ing to the issue of the patent."

The rule thus laid down has been adhered to ever since its announcement, both by the courts and the Land Department.

In the case of Wright *v.* Dubois, 21 Fed. Rep. 693–696, Mr. Justice Brewer, in the opinion, summed up the propositions decided therein as follows: "First, the Government, as a land-owner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere; second, publication of notice is process bringing all adverse claimants into court, and if no adverse claims are presented it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land; third, thereafter the only right or privilege remaining to any third parties is that of protest or objection filed with the Land Department, and cognizable there only."

In Golden Reward Mining Co. *v.* Buxton Min. Co. 79 Fed. 868–874, the same distinguished judge, after quoting sec. 2325 of the Revised Statutes, said: "The expression 'it shall be assumed' must be con-

strued to mean 'conclusively assumed' as any other construction would defeat the object of the statute."

In Burnside *et al. v.* O'Connor *et al.*, 30 L. D. 67–70, Secretary Hitchcock, after quoting the same section said: "The Hibernia having failed to file an adverse claim against the Mary Navin during the latter's period of publication, it must be assumed that no such adverse claim exists, and the department can not now hear any objection from the Hibernia claimants to the issuance of patent for the Mary Navin, based merely on an assertion of prior right to a portion of the land included in the Mary Navin entry. The
232 provisions of the statute are clear, and as the Hibernia claimants have, by their own negligence, placed themselves in such a position relative to the Mary Navin application that it must be assumed they have no adverse claim against said application, it is useless to suspend the Mary Navin entry to await the result of the suit by the Mary Navin against the Hibernia."

In Brauagan *v.* Dulaney, 2 L. D. 744, Secretary Teller said: "It has been the practice of the Land Office not to inquire as to the status of the original or prior location when the discovery is made within the boundaries thereof, unless an application for patent has been made for such original or prior location. If the owner of the original or prior location neglects to adverse the application for a patent to the junior location, it must be assumed, under the provisions of section 2325 of the Revised Statutes, that the claimant of such junior location is entitled to a patent as against the claims of the prior locator."

In the matter of the Nevada lode, 16 L. D., it was held that "A charge of non-compliance with law against a mineral entry, made by a protestant may properly form the basis of a hearing, but the protestant in such a case is not entitled to set up his own claim to the land."

In American Consol. M. & M. Co. *v.* De Witt, 26 L. D. 580, it appears that De Witt made application for a patent for the Maryland mining claim, and that the American Company afterwards protested, and one of the grounds of the protest was that the "Maryland was not a valid location, in that the discovery therein was on the Orbit claim, a prior and subsisting location, and not upon unappropriated public land; that the Orbit vein was the only one discovered within the limits of the Maryland." Secretary Bliss, in ruling
233 adversely to the protestant said: "Whether the ground which includes the Maryland discovery is a part of the Maryland, or a part of the Orbit, and whether the Maryland is the superior claim to the ground in conflict, are questions which were open to determination by adverse proceedings in the local courts and which are now determined adversely to protestant's contention, by reason of its failure to adverse the Maryland's application (section 2325)."

The evident intention of the adverse proceedings, authorized by sec. 2326 of the Revised Statutes, is not to determine any of the rights of the United States, or the rights of the contestants to a

patent; but, in aid of and for the information of the Land Department, to determine, as between the litigants the right to the possession of the mining claim in dispute.

In Doe *v.* Waterloo Min. Co. 70 Fed. 455–462, after quoting sec. 2326 of the Revised Statutes, the court said: "There is no authority in the statute to find against the United States, and that the party so establishing title is entitled to a patent from the United States. The United States is not named as a party. The suit does not purport to be one against the United States. No authority is given by the statute to sue the United States in such a matter. The application for a patent for mineral land is made to the Land Department of the United States. Ultimately that department must determine the right to the patent. The trial of the right to the possession of a given tract of mineral land is a proceeding in aid of that department. It was not intended that when this issue was presented to a court it should operate as a transfer of the whole case made by the application, and that thereafter the Land Department would have nothing to do but to carry into effect the judgment of the court. A State court of general jurisdiction has the power to determine this issue, and such courts are often called upon
234 to try causes arising under the said section 2326. Can it be supposed that it was intended that under the said statute such a court would have the power to determine whether or not the United States should issue a patent to any applicants? The power to sue the United States in a State court should rest upon some positive statute. It can not be inferred from such a statute as the one in question." To the same effect see Wight *v.* Dubois, 21 Fed. 694.

We think it is clear, both from the language of the sections of the Revised Statutes referred to and the authorities cited that it must, as stated by Mr. Justice Brewer, be conclusively presumed that Andrew P. Mayberry, as he failed to make any adverse claim, had none, and as the plaintiff failed to show any right to the disputed premises, he became a stranger to the title, and thereafter had no more right than any other stranger to further contest the defendant's claim. While Mayberry has the right, like any stranger to protest, he cannot do so on the basis of any rights he may have had in either the Levi P. or Veta mining claims. It follows that he conclusively waived his right to do so by failing to file an adverse claim, and that the plaintiff in this case, and all other strangers to the title are likewise precluded from protesting on like grounds.

The trial court found that "On or about the 1st day of January, 1889, one Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain mining district, Salt Lake county, State of Utah, and having discovered thereon a lode of mineral-bearing rock in place, bearing lead, iron, silver and other minerals, did then and there locate the same as the 'Uhlig No. 1'
and 'Uhlig No. 2' Lode mining claims, by marking the
235 boundaries thereof upon the ground by suitable monuments, so that the boundaries thereof could be readily traced, an- by

posting at the points of discovery upon said mining claims respectively notices of location, describing the same by reference to natural objects and permanent monuments; that thereafter he caused copies of said notices of location, respectively, to be filed and recorded in the office of the district recorder of said West Mountain mining district. That thereafter the said Edmund H. Uhlig, and the defendant, The St. Joe Mining Company, remained in possession of said mining claims, working and developing the same and causing to be done thereon and for the benefit of said claims in each and every year up to and including the year 1900 the annual assessment work required by the laws of the United States."

The application for a patent for the Uhlig No. 1 and 2 was made on August 24, 1898. The 'Yes You Do' was located on the 1st of January, 1898, eight years after the location of the Uhlig No. 1 and 2.

Sec. 2332 Rev. Stat. provides that "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State and Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property attached prior to the issuance of a patent."

Sec. 2997, subd. 2, Comp. Laws, Utah, 1888, provides that the words "real property as used in the code of civil procedure, unless otherwise apparent from the context, are co-extensive with
236 lands, tenements and hereditaments, water rights, and possessory rights and claims."

The territorial supreme court in Houtz *v.* Gisborn, 1 Utah, 173–176, held that under said section, mining claims are real property and pass by deed.

There are numerous authorities which hold (without regard to statutory provision) that mining claims are real estate.

1 Lindley on Mines, sec. 535.
Barringer & Adams Law of Mining, p. 568 *et seq.*
Aspen Min. & S. Co. *v.* Bucker, 28 Fed. 222, and cases cited.
Harris *v.* Equator Min. Co., 8 Fed. 863.
Hughes *v.* Devlin, 23 Cal. 506.
Roseville Min. Co. *v.* Iowa Min. Co., 15 Col. 29.
McPeters *v.* Pierson, *ibid.* 201.

Sec. 2332 is applicable to lode mining claims.

2 Lindley on Mines, sec. 688.
Harris *v.* Equator Min. Co., 8 Fed. 868.
Altoona Min. Co. *v.* Integral Min. Co., 114 Cal. 100.
Belk *v.* Meagher, 104 U. S. 279–287.

In the last mentioned case (p. 287) after quoting sec. 2332, the court, speaking through Mr. Chief Justice Waite, said: "Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete."

In the case in 114 Cal. 105, Mr. Justice Temple, in connection with said section, said: "It must, therefore, follow that where such possession has continued for five years before the adverse right exists, it is equivalent to a location under the laws of Congress." And in support thereof cites Harris *v.* Equator Min. Co. *supra;* Belk *v.* Meagher, *supra* and Anthony *v.* Jilson, 83 Cal. 296.

237 Subd. 2, sec. 2997, Comp. Laws, Utah, 1888, is still in the Revised Statutes of 1898, subd. 10, sec. 2498.

A mining claim being a possessory right, it is real estate under the provisions of the statutes of Utah, before referred to, and any claim which Mayberry might have had, as he failed to institute a suit to recover the same within seven years after the possession of the Uhlig Nos. 1 and 2, as found by the trial court, began, was barred by sec. 2859 of Revised Statutes of Utah, which is as follows: "No action for the recovery of real property, or for the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor was seized or possessed of the property in question within seven years before the commencement of the action." It was also waived by his failure to adverse the application for a patent of the Uhlig Nos. 1 and 2. In view of these facts, the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy U. S. mineral surveyor, as the location of the 'Yes You Do' was not made until eight years after the said possession of the Uhlig Nos. 1 and 2 was begun, could not avail himself of any rights which the said Mayberry may have had.

The objection to the admission in evidence of the certified copy of the notice of location of the 'Yes You Do,' and the deed to Lavagnino, offered in connection therewith, and the objection to the evidence relating to the 'Levi P.' and 'Veta' mining claims were properly sustained.

The decree of the court below is affirmed, with costs.

We concur:—

BARTCH, *J.*
HART, *D. J.*

238 In the Supreme Court of the United States.

GIOVANNI LAVAGNINO, Plaintiff in Error,
vs.
EDMUND H. UHLIG, ALEX. MCKERNAN, & THE ST. JOE MINING Company, a Corporation, Defendants in Error.

Comes now Giovanni Lavagnino, the plaintiff herein and respectfully shows to the court:

1. That on the 16th day of November, 1898, he as plaintiff brought suit against Edmund H. Uhlig and Alex. McKernan as defendants in the third judicial district court of the State of Utah in and for Salt Lake county, claiming to be the owner as against said defendants of the "Yes-You-Do" Lode mining claim, situate in the West Mountain mining district, Salt Lake county, Utah.

2. That on the 7th day of July, 1900, your petitioner as said plaintiff filed in said suit his second amended complaint in which he alleged that he was the owner of said "Yes-You-Do" Lode mining claim, that the defendants had wrongfully caused two certain lode mining claims called the "Uhlig No. 1" and the "Uhlig No. 2" to be located and surveyed for patent so that they overlapped said "Yes-You-Do" Lode mining claim and conflicted therewith, as particularly set forth in said second amended complaint, and alleging that on the 24th day of August, 1898, the defendants filed the field notes and a diagram of said surveys of said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims and also an application
239 for a United States patent for the same, in the United States land office at Salt Lake City, State of Utah, and caused the register of said land office to give notice of said application for patent by publication as required by law, and praying judgment that the plaintiff be decreed against the said defendants to be the owner, entitled to, and in the possession of the "Yes-You-Do" Lode mining claim including the area in conflict between said "Yes-You-Do" mining claim and the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, and quieting and confirming the plaintiff's title thereto, and for general equitable relief.

3. That on the 21st day of September, 1900, the defendant Edmund H. Uhlig filed his answer to said amended complaint, denying the allegations of said amended complaint and by way of counterclaim against the plaintiff alleged that the said defendant Uhlig on the 1st day of January, 1889 located the said Uhlig No. 1 and Uhlig No. 2 Lode mining claims, describing them, and that thereafter the said Uhlig conveyed to his co-defendant McKernan, an undivided one-third interest in said mining claims, and alleging that the area in conflict between the said mining claims and the Yes-You-Do mining claim belonged to the said defendants as parts of the said Uhlig No. 1 and Uhlig No. 2 Lode mining claims, and that the plaintiff has no right, title or interest in said areas in conflict,

and alleging that the suit had been dismissed as to the defendant McKernan and praying judgment that it be decreed that the plaintiff had no right, title nor interest to any part of the said Uhlig No. 1 or Uhlig No. 2 Lode mining claims; and that the defendant an his co-owner be decreed to be the sole owners and entitled to the possession of the said Uhlig No. 1 and Uhlig No. 2 Lode mining claims.

4. That the said cause came on to be heard before the said
240 court on the 25th day of March, 1901, and upon said hearing it appeared from the undisputed testimony that the said Yes-You-Do Lode mining claim was located on the 1st day of January, 1898, by J. Fewson Smith, Jr., the location under which the plaintiff claimed, and it further appeared that the said J. Fewson Smith, Jr., at the time of the location of said Yes-You-Do Lode mining claim, was a deputy United States mineral surveyor and had been for seven or eight years prior thereto; and thereupon to support his contention the plaintiff offered in evidence the notice of location made by the said J. Fewson Smith, Jr., and a deed from J. Fewson Smith, Jr., to the plaintiff herein, duly executed and delivered after said location, and thereupon the defendant objected to the introduction of the same on the ground that it affirmatively appeared that the location was made by a deputy United States mineral surveyor and that he was prohibited by law from making said location and therefore the location was in violation of law and was not a valid location and could not be the basis of anything to transfer to anybody. And the court thereupon sustained the objection for the reasons stated.

Thereupon the plaintiff offered to prove that within the time prescribed by the Federal statute the plaintiff filed in the United States land office, a proper protest and adverse claim with respect to the area in conflict between the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims and the Yes-You-Do claim, and that within thirty days of the time of filing the protest and adverse claim the plaintiff commenced this action in this court to determine the right of possession of the area in conflict between said claims, and that the plaintiff had performed the annual labor and improvements required by law upon the Yes-You-Do mining claim for the years 1899 and 1900 and that for sometime antecedent to the time that the protest and
adverse claim were filed by the plaintiff in this action in the
241 United States land office the title had passed from J. Fewson Smith, Jr. to the plaintiff herein to the Yes-You-Do mining claim. And further offered to prove that the certified copy of the location notice offered was recorded January 3, 1898 at 10·21 a. m. at the request of said J. Fewson Smith, Jr. in the office of the county recorder of Salt Lake county and is recorded and described in Book G of Mining Abstracts, page 191; and that the plaintiff and his grantor have during the time since the location of this claim complied with all the laws, rules and regulations of the State of Utah and the West Mountain mining district to entitle them to the

possession of the Yes-You-Do mining claim, including the area in conflict between the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims.

To which offer to prove the defendant objected on the ground that it is immaterial, the foundation having fallen and there being no location at all they must go with it, and for the same reasons contained in the objection made to the introduction of the notice of location. Thereupon the court sustained said objection on the ground that the location was void because J. Fewson Smith, Jr. being at the time the location was made by him, a deputy United States mineral surveyor, was not authorized but prohibited by law from making the location, and that the filing of the adverse claim by him in the land office was invalid; and thereupon the plaintiff rested and the defendant thereupon made proof of the title and right of possession of himself and co-defendant to the Uhlig No. 1 and Uhlig No. 2 Lode mining claims; and thereupon the court made findings of fact that the plaintiff had not introduced any competent evidence to sustain the allegations of the complaint or the issues in behalf of the plaintiff, and decree was entered
242 dismissing the plaintiff's complaint.

5. Thereupon in due time your petitioner prosecuted an appeal from the said judgment to the supreme court of the State of Utah and upon the hearing of said cause in the supreme court of Utah it was contended by your petitioner, the appellant therein, that at the time of the location of the Yes-You-Do Lode mining claim, by said J. Fewson Smith, Jr., to wit: on January 1st, 1898, the said J. Fewson Smith, Jr. was not prohibited by the laws and statutes of the United States in force at the time from making the location of said mining claim, because of the fact that he was at the time a deputy United States mineral surveyor, and claimed that under the laws and statutes of the United States the location of the Yes-You-Do Lode mining claim made by J. Fewson Smith, Jr. was a valid location and that the court below erred in holding that the location was void because of the fact that said J. Fewson Smith, Jr. at the time of making the location, to wit: on January 1st, 1898, was a deputy United States mineral surveyor, and your petitioner made no claim to said Yes-You-Do Lode mining claim in the court below or in the supreme court of the State of Utah other than that the location made by J. Fewson Smith, Jr. of said Yes-You-Do Lode mining claim on the 1st day of January, 1898 was a valid location notwithstanding the fact that at the time he was a deputy United States mineral surveyor, and that said Smith had after said location conveyed to him all his interests therein and that he had complied with the laws of the United States, the State of Utah, and the local laws and customs in regard to lode mining claims.

6. That the supreme court of the State of Utah affirmed the judgment of the court below.

243 7. That the supreme court of the State of Utah in deciding said cause and in affirming said judgment expressly held

that under the laws of the United States, Rev. St. U. S. sec. 452, (U. S. Comp. St. 1901, page 257), said J. Fewson Smith, Jr., at the time of making the location of the Yes-You-Do Lode mining claim was prohibited from making said location because he was a deputy United States mineral surveyor and that the location made by him was void and that he acquired thereby no title to or interest in said mining claim so located and that no title to or interest in said mining claim passed to your petitioner the plaintiff in said cause by the deed from the said J. Fewson Smith, Jr., to him, and that the adverse claim to the application for patents to the Uhlig No. 1 and Uhlig No. 2 Lode mining claims filed in the land office by the said plaintiff was invalid because the location made by said J. Fewson Smith Jr. under which he claimed was void, and that therefore the court below did not err in sustaining the objection to and excluding the evidence offered by your petitioner the plaintiff in said cause, which is hereinbefore set forth, and passed upon no other question in said cause.

In this judgment of the supreme court of the State of Utah, this plaintiff is by his counsel advised and verily believes and therefore states that error was committed to his great detriment and injury which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore your petitioner prays that a writ of error may issue in this behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in the cause duly authenti-
244 cated may be sent to the Supreme Court of the United States.

Dated July 10, 1903.

GIOVANNI LAVAGNINO,
By N. W. SONNEDECKER &
ANDREW HOWAT,
His Attorney-.

245 *Assignment of Errors.*

Now comes Giovanni Lavagnino, petitioner for writ of error to the supreme court of the State of Utah, by N. W. Sonnedecker & Andrew Howat his attorneys and says that the said supreme court of the State of Utah in rendering its decision and judgment in this cause, erred in the following particulars, to wit:

1. The supreme court of the State of Utah erred in holding that the location of the Yes-You-Do Lode mining claim by J. Fewson Smith, Jr., was invalid because said Smith at the time of the location was a deputy United States mineral surveyor.

2. Said court erred in holding that the court below did not err in sustaining the objection of the defendant to the introduction in evidence by the plaintiff of the notice of location of the Yes You Do Lode mining claim by J. Fewson Smith, Jr., upon the ground that

said location was invalid because J. Fewson Smith, Jr., at the time of the location was a deputy United States mineral surveyor.

3. Said court erred in holding that the court below did not err in sustaining the objection of the defendant to the introduction in evidence by the plaintiff of the deed from said J. Fewson Smith, Jr., to the plaintiff Giovanni Lavagnino for said lode mining claim upon the ground that the location of said mining claim by said J. Fewson Smith, Jr., was invalid because he at the time of the location was a deputy United States mineral surveyor and that therefore there was no valid location of said claim by said Smith.

N. W. SONNEDECKER &
ANDREW HOWAT,
Attorneys for Plaintiff in Error.

246 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said supreme court of the State of Utah, before you or some of you, being the highest court of law of the said State in which a decision could be had in the said cause between Giovanni Lavagnino as plaintiff, and —— —— as defendants, and where the said Giovanni Lavagnino claimed the title and right to the property in question in said suit under a statute of the United States and the decision of the said supreme court was against the title and right under the statute of the United States claimed by said Giovanni Lavagnino, a manifest error hath happened to the great damage of the said Giovanni Lavagnino as by his complaint appears, we, being willing that error if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the 14" day of September, 1903, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error
247 what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16 day of July, 1903.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk of the United States Circuit Court, District of Utah.

Allowed by
ROBERT N. BASKIN,
Chief Justice of the Supreme Court of the State of Utah.

248 UNITED STATES OF AMERICA, *ss:*

To Edmund H. Uhlig, Alexander McKernan, and The St. Joe Mining Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Utah, at Salt Lake City, wherein Giovanni Lavagnino is plaintiff in error, and said Edmund H. Uhlig, Alexander McKernan, and The St. Joe Mining Company, a corporation, are defendants in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert N. Baskin, chief justice of the supreme court of the State of Utah, this 18 day of July, 1903.

ROB'T N. BASKIN,
Chief Justice of the Supreme Court of the State of Utah.

Service accepted & copy received this 18 day of July 1903.

D. H. WENGER AND
PIERCE, CRITCHLOW & BARRETTE,
Attorneys for St. Joe Mining Company.

249 STATE OF UTAH, } *ss:*
County of Salt Lake, }

I, Alexander Gibbons, being duly sworn depose and say; That I am over 21 years of age, and I am not interested in the above entitled suit; that on the 21st day of July, 1903, at Salt Lake City, Utah, I served the citation hereto attached upon D. H. Wenger, attorney for Edmund H. Uhlig and Alexander McKernan, by showing him the original citation and delivering to him a true copy thereof.

ALEXANDER GIBBONS.

Subscribed and sworn to before me this 21st day of July, 1903.

{ Seal of Florence Hartley, Notary Public, Salt Lake County, Utah. Commission Expires June 13, 1906. }

FLORENCE HARTLEY,
Notary Public, Salt Lake County, Utah.

250 STATE OF UTAH, } ss:
County of Salt Lake, }

I, Alexander Gibbons, being duly sworn depose and say; That I am over 21 years of age, and am not interested in the above entitled suit; that on the 22nd day of July, 1903 at Salt Lake City, Utah, I served the citation hereto attached upon Brown & Henderson, attorneys for Edmund H. Uhlig and Alexander McKernan and also at the same time and place served the said citation upon Pierce, Critchlow & Barrette attorneys for the said Edmund H. Uhlig and Alexander McKernan by showing to them the original citation and by delivering to each of them a true copy of the said citation.

ALEXANDER GIBBONS.

Subscribed and sworn to before me this 22nd day of July, 1903.
[Seal of Abial B. Sawyer, Jr., Notary Public, Salt Lake County, Utah.]

ABIAL B. SAWYER, JR.,
Notary Public.

251 In the Supreme Court of the State of Utah.

GIOVANNI LAVAGNINO, Plaintiff in Error,
vs.
EDMUND H. UHLIG, ALEX. MCKERNAN, & THE ST. JOE MINING COMPANY, a Corporation, Defendants in Error.

Know all men by these presents: That we, Giovanni Lavagnino, as principal, and W. S. McCornick and A. Hanauer, of Salt Lake City, State of Utah, as sureties, are held and firmly bound unto the defendants, Edmund H. Uhlig, Alexander McKernan and The St. Joe Mining Company, a corporation, in the full and just sum of three hundred ($300) dollars to be paid to the said defendants, their certain attorneys, administrators, executors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of July, in the year of our Lord one thousand, nine hundred and three.

Whereas, lately in the supreme court of the State of Utah, in a suit pending in said court between Giovanni Lavagnino, as plaintiff, and Edmund H. Uhlig, Alexander McKernan, and The St. Joe Mining Company, a corporation, as defendants, judgment was rendered against the said Giovanni Lavagnino, and the said Giovanni Lavagnino having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the
252 aforesaid suit, and a citation directed to the said Edmund H. Uhlig, Alexander McKernan and The St. Joe Mining Company, a corporation, citing and admonishing them to be and appear

at a session of the Supreme Court of the United States, at Washington, on the — day of —— 1903.

Now the condition of the above obligation is such, that if the said Giovanni Lavagnino shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

GIOVANNI LAVAGNINO.
W. S. McCORNICK.
A. HANAUER.

Sealed and delivered in the presence of

A. HANAUER, JR.

Approved: July 16, 1903.

ROBERT N. BASKIN, *C. Justice.*

(Copy.)

253 UNITED STATES OF AMERICA.

STATE OF UTAH, } ss:
County of Salt Lake, }

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, pursuant to a writ of error allowed in a cause wherein Giovanni Lavagnino, is plaintiff in error, and Edmund H. Uhlig, Alex. McKernan and The St. Joe Mining Company, a corporation, are defendants in error, do return attached hereto a full, true and correct copy of the transcript of record on appeal to the supreme court of said State of Utah, now of record and on file in my office, a copy of the judgment rendered by said court, and the opinion filed therein, together with the original petition for writ of error, assignments of error, writ of error, citation, also a copy of the bond filed herein approved by the chief justice of this court.

In witness whereof I hereunto set my hand and affix the seal of said supreme court this 5th day of September, A. D. 1903.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

LILBURN P. PALMER,
Clerk Supreme Court.

Endorsed on cover: File No. 19,075. Utah supreme court. Term No. 120. Giovanni Lavagnino, plaintiff in error, *vs.* Edmund H. Uhlig, Alexander McKernan and The St. Joe Mining Company. Filed September 24", 1903. File No. 19,075.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE ST. JOE MINING COMPANY.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

STATEMENT.

The ground of this motion is that, whilst a right under Federal statute was distinctly raised in the courts below by plaintiff in error and was as distinctly denied, the decision of the supreme court of Utah was rested upon another ground not involving a Federal question sufficiently broad to support the judgment, and hence under the well-settled rule in this court the pending writ should be dismissed. The rule is too well settled to require discussion. Our contention is that the facts of present record demonstrate that it does not here apply.

This is an "adverse claim" suit brought by plaintiff in error under the United States mining laws, claiming priority of right to the *res* involved:

(1.) By purchase from the locator of the "Yes You Do" Lode mining claim, and

(2.) That such location was made on the abandonment of the "Levi P." and "Veta" Lode mining claims, covering the same premises, and hence forming continous and paramount record claim and right of possession against the defendants in error since January 1, 1889.

The location of the "Yes You Do" claim was made January 1, 1898, under the United States mining laws and as a "relocation of the Levi P. claim" (R., 135, 136) by J. Fewson Smith, Jr., and conveyed by the locator to the plaintiff in error on September 5, 1898 (R., 136, 137). At the trial the plaintiff first offered in evidence both the location certificate and deed. The defendants objected upon the ground that the locator (Smith) was at the time of the location a deputy mineral surveyor and was thereby prohibited under section 452, U. S. Rev. Stats., from making such location; that such location was invalid, and the attempted conveyance thereof to plaintiff likewise invalid. The court sustained the objection upon the distinct understanding, expressed upon the record, that it was thereby ruling a Federal question, inasmuch as the plaintiff claimed right to the premises under section 2319, U. S. Rev. Stats., and his right thereto was denied under the court's construction of section 452 thereof (R., 73, 74).

Before the supreme court of Utah this question stood at the front for discussion and decision, as will be found by examination of its opinion (R., 140–149).

After the trial court had thus excluded all evidence relating to the "Yes You Do" claim and the conveyance thereof to the plaintiff, counsel offered to prove (R., 75), *inter alia*, the location of the "Levi P." and "Veta" claims antecedent to the locations under which the defendants rely; the per-

formance of annual labor upon the "Levi P." and "Veta" claims, and their abandonment, as well as failure to perform annual labor thereon for the year 1897, resulting in the location of the "Yes You Do" claim January 1, 1898. To this offer the defendants objected.

Pending the court's final ruling thereon the defendants were permitted to make proof of their claim of right to the premises in dispute under the locations known as "Uhlig No. 1" and "Uhlig No. 2," as made January 1, 1889.

Thereupon the plaintiff offered in evidence the location notice of the "Levi P.," to which the defendants objected, and the trial court sustained the objection upon the ground that no proof whatever could be offered in respect of the "Levi P." claim, because the owner or claimant thereof had not, during the period of publication of application for patent by the defendants on the "Uhlig No. 1" and "Uhlig No. 2" claims, filed adverse claim under section 2326, U. S. Rev. Stats.; that hence neither plaintiff nor any one else could prove as a *fact* that the premises in dispute were covered by the "Levi P." claim or possession or right of possession thereunder (R., 130, 131).

To this ruling exception was taken. The supreme court of Utah affirmed the ruling of the trial court and for the same reason (Op. R., 145–147), holding that this plaintiff had no legal right to show the status of the premises as covered by an existing valid location, to wit, the "Levi P.," down to January 1, 1898, when the location of the "Yes You Do" claim was made.

Having thus excluded *all evidence* offered by the plaintiff, there was nothing left by way of proof except that adduced by the defendants.

Upon such *ex parte* showing the trial court found the facts as relating solely to the "Uhlig No. 1" and "Uhlig No. 2" and gave judgment for the defendants accordingly. Treating these rulings and findings as conclusive of all questions of *fact* in the case, the supreme court of Utah proceeded to

apply the local statute of limitations in favor of the defendants, and without the suggestion of any plea by defendants of the statute of limitations *anywhere* in the record, by holding in effect that as by such findings the defendants had been in possession for over seven years (the Utah statute of limitations) prior to the location on January 1, 1898, of the "Yes You Do" claim, their right was superior on that ground. In thus applying the local statute of limitations the supreme court of Utah invoked section 2332, U. S. Rev. Stats., which provides that (R., 148):

> "Where such person or association, they and their "grantors, have held and worked their claims for a "period equal to the time prescribed by the statute "of limitations for mining claims of the State and "Territory where the same may be situated, evidence "of such possession and working of the claims for "such period shall be sufficient to establish a right to "a patent thereto under this chapter, in the absence "of any adverse claim; but nothing in this chapter "shall be deemed to impair any lien which may have "attached in any way whatever to any mining claim "or property attached prior to the issuance of a "patent."

The court reaches this conclusion by assuming the possession of the entire premises by the defendants under the "Uhlig No. 1 and No. 2" locations for a period of seven years, during which time the locator and claimant of the "Levi P." and "Veta" claims brought no action to recover the possession, as well as by his failure to file adverse claim against the application for patent on the Uhlig Nos. 1 and 2.

After thus applying the statute of limitations without, as stated, its being anywhere in the record plead by the defendants, the opinion concludes:

> "In view of these facts the plaintiff, even if J. Few-"son Smith, Jr., had not been a deputy United States "mineral surveyor—as the location of the 'Yes You "Do' was not made until eight years after the said

"possession of the Uhlig Nos. 1 and 2 was begun—
"could not avail himself of any rights which the said
"Mayberry may have had."

This is the ground on which the pending motion to dismiss is based. It is insisted that the court in thus ruling put its decision upon ground sufficiently broad to sustain the judgment, and which did not involve any Federal question. We submit that the error of this conclusion is manifest.

ARGUMENT.

I.

It was of the very essence of the plaintiff's case to show that the premises in question had been covered by an existing location and possession, to wit, the "Levi P." and "Veta" claims, since January 1, 1889, but the evidence offered in the trial court to establish this fact was wholly excluded. The legal effect of such evidence, if admitted, would have been to demonstrate that the right of possession was not in the defendants, but in the locator of the "Levi P." and "Veta" claims—a right distinctly recognized and protected by section 2332, U. S. Rev. Stats., *supra*. Manifestly, then, this was a right set up under Federal law, and by the rejection of the proffered evidence it was a right distinctly denied in the trial court, and such denial affirmed in the State supreme court.

II.

Even could the supreme court of Utah voluntarily apply the local statute of limitations, it is manifest that section 2332, U. S. Rev. Stats., in recognizing the application of the local statute of limitations, must be construed *in pari materia* therewith. That section notes an express exception to the

application of the local statute of limitations, to wit, "*the absence of any adverse claim.*"

It was contended in the trial court and in the supreme court of Utah, on behalf of this plaintiff, that the "Levi P." was such an adverse claim. The evidence to prove that contention was, however, excluded and the court below then proceeded to apply solely the local statute of limitations, having first ruled that the location of the "Levi P." could not be considered because Mayberry, the locator and owner thereof, had not filed an adverse claim, and thereby overruling the express exception of section 2332, U. S. Rev. Stats., *supra.*

The location of the "Yes You Do" claim was made in terms as a relocation of the "Levi P." claim. It was made (1) upon the abandonment of the "Levi P." claim, and (2) upon forfeiture of that claim through failure of the claimant thereof to perform the annual assessment work for the year 1897. As against even the plea of the statute of limitations under section 2332, U. S. Rev. Stats., the claimant of the relocated "Levi P.," to wit, the "Yes You Do" claim, clearly had the right to show the former location and possession had by the former claimant thereunder. Such right of relocation on abandonment or forfeiture is expressly conferred by section 2324 of the U. S. Rev. Stats. It was expressly claimed by the locator of the "Yes You Do" claim. When the court below refused the right of the plaintiff in error to introduce evidence as to the existence of such former and abandoned location and the possession of the former claimant thereunder, it expressly denied a right set up under section 2324, U. S. Rev. Stats. The proof so offered was intended to show that the defendants in error had *not* been in continuous adverse possession for the period of limitation prescribed by the Utah statute of limitations. Manifestly the *exclusion* of such evidence was the *only* possible way in which the defendants in error could *ex parte* prove their possession and the only way by which the court on such

unilateral proof could have held *mero motu* that the statute of limitations did so apply.

We submit the Federal character of the question ruled is manifest. The court could not exclude the proffered evidence and its conclusion be then urged as involving only the State statute of limitations and hence beyond the power of review in this court. Such contention, carried to its logical result, would destroy all rights of the locator of an abandoned or forfeited claim under section 2324, U. S. Rev. Stats.—a result plainly against any sound construction of that section and leading to rank injustice.

Again, section 2332, U. S. Rev. Stats., applies the local statute of limitations only "in the absence of any adverse claim." But in the case at bar there *is* an adverse claim. One of its plain and essential elements is that it is based upon the relocation of another claim, which had been in existence since January 1, 1889. That right of relocation is expressly conferred by Federal law. (See sec. 2324, U. S. Rev. Stats.) The proffered and *rejected* proof was intended to show the existence of such former claim and the claimant's continuous possession thereunder. Such proof if admitted would have challenged the defendants in error's claim of possession for the period covered by the State statute of limitations. The mining laws cannot be construed to mean that because the claimant of the original and abandoned claim did not *after* such abandonment and relocation file his adverse claim to the application of the defendants in error—made after such abandonment and relocation—the present adverse claimant, whose claim was based upon the relocation of the former claim, cannot be heard to show in this action the *facts* as to such former and abandoned claim as rebutting the defendants' claim of possession for the period of limitation. That result would destroy the rights of the relocator and make the mining statute a snare and a reproach.

In *Beck vs. Meagher*, 104 U. S., 279, cited in the opinion

below, this court in applying section 2332, U. S. Rev. Stats. said (p. 287):

> "If he actually held possession and worked the "claim long enough *and kept all others out*, his right "to a patent would be complete."

But here we offered to show (1) the original location of the "Levi P.;" (2) possession thereunder, which would disprove that defendants had "*kept all others out*," and (3) upon abandonment and forfeiture of such original location our *relocation* of the premises was authorized by section 2324, U. S. Rev. Stats.

Clearly, in rejecting such evidence and in its absence then applying the State statute of limitations, the court below distinctly denied the right of the plaintiff in error, plainly asserted under section 2324, U. S. Rev. Stats., and as clearly *that* ruling involves a Federal question reviewable here.

Respectfully submitted.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Attorneys for Plaintiff in Error.

N. W. SONNEDECKER,
Of Counsel.

FILE COPY.

Supreme Court U. S.
FILED
DEC 31 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE ST. JOE MINING COMPANY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF FOR PLAINTIFF IN ERROR.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

N. W. SONNENBERG,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 14197

SUPREME COURT OF THE UNITED STATES.

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GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE ST. JOE MINING COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case is brought here by writ of error to the supreme court of the State of Utah (Rec., 154) to review the judgment of that court (Rec., 140) affirming the judgment and decree of the district court of the third judicial district (Rec., 39) by which the defendants (defendants in error here) were adjudged to be entitled to the possession of certain lode mining ground in the West Mountain mining district, Salt Lake county, Utah.

The suit is the ordinary form of adverse claim proceeding provided for by section 2326 United States Revised Statutes, and was brought by the plaintiff in error, Lavagnino, to determine his right to the possession of the ground embraced in the application of the defendants Uhlig and McKernan

for patent to the Uhlig No. 1 and Uhlig No. 2 Lode mining claims. Plaintiff's adverse claim is based upon his ownership of the Yes You Do Lode claim, covering the identical ground embraced in the Uhlig No. 1 and Uhlig No. 2 locations (Rec., 12). Summons was quashed and complaint dismissed as to the defendant McKernan (Rec., 7), and the defendant Uhlig answered, denying the allegations of the complaint (Rec., 16). Subsequently, by order of court (Rec., 19), the St. Joe Mining Company was substituted for the defendant Uhlig.

The case coming on for trial, the plaintiff, Lavagnino, testified (Rec., 46) that he purchased the Yes You Do claim, on which his adverse claim was based, from one J. Fewson Smith, Jr. J. Fewson Smith, Jr., was then sworn as witness for plaintiff, and testified (Rec., 48) that he located the Yes You Do claim on January 1, 1898; that at the time of such location he was a United States deputy mineral surveyor (Rec., 49); that his location was made as a relocation of the Levi P. Lode claim (Rec., 53), and that the areas of the Yes You Do and Uhlig No. 1 and Uhlig No. 2 claims were in conflict (Rec., 54–57). Counsel for plaintiff then offered in evidence (Rec., 72–73) the location notice of the Yes You Do claim (Rec., 135) and the deed of Smith conveying said claim to him (Rec., 136). To this offer defendant objected, and objection was sustained by the court (Rec., 74) on the ground that "under the law J. Fewson Smith, Jr., the locator of the claim was prohibited from making the location of a lode mining claim, and therefore had not the qualifications to initiate any title by any act that he did with reference to locating the Yes You Do mining claim," the court basing his ruling upon the construction of section 452, U. S. Rev. Stats. To this ruling plaintiff duly excepted.

For the purpose of the record plaintiff's counsel then offered to show (Rec., 74) that

> "within the time prescribed by the Federal statute, "the plaintiff filed in the United States land office a

"proper protest and adverse claim with respect to the "area in conflict between the Uhlig No. 1 Lode min- "ing claim and the Uhlig No. 2 Lode mining claim, "and the Yes You Do mining claim, and that within "thirty days of the time of filing the protest and "adverse claim, the plaintiff commenced this action. "At the time the Uhlig No. 1 and the Uhlig No. 2 "mining claims were located, that there was a "subsisting, valid location known as the Levi "P. location, and also a further subsisting valid "location known as the Veta location; that the "Levi P. location covered all of the area in "conflict between the Yes You Do and the Uhlig "No. 1 and the Uhlig No. 2 claims, and that "the necessary labor required by the United States "statute for the Levi P. claim was performed "up to and including the year 1896, and that in the "year 1897, previous to the location of the Yes You "Do, the owner of the Levi P. claim abandoned all "rights to that claim, and also performed no annual "labor or improvements upon that claim for the year "1897; and also that the Veta Lode mining claim "was located in the same year as the Uhlig No. 1 and "the Uhlig No. 2, and antecedent in point of time to "the Uhlig No. 1 and Uhlig No. 2, and covered the "discoveries of each of said claims. Also that plain- "tiff has performed the annual labor and improve- "ments required by law upon the Yes You Do min- "ing claim for the years 1899 and 1900. Also "to prove, antecedent to the time that the pro- "test and adverse claim were filed by the plain- "tiff in this action in the United States land office, "that the title had passed from J. Fewson Smith, Jr., "to the Yes You Do, to Giovanni Lavagnino, the "plaintiff in this action; that the certified copy of the "location notice offered was recorded January 3d, "1898, at 10.21 a. m. at the request of J. Fewson "Smith, Jr., in the office of J. C. Jensen, county re- "corder of Salt Lake county, and is recorded in or "described in Book G of Mining Abstracts, page 191, "and that the plaintiff and his grantor have, during "the time since the location of this claim, complied "with all the laws, rules and regulations of the United

> "States and of the State of Utah, and of the West "Mountain mining district, to entitle them to the "possession of the Yes You Do Lode mining claim, in- "cluding the conflict area between the Uhlig No. 1 "and the Uhlig No. 2 claims."

To this offer objection was made by defendants, and the court, sustaining the objection, said (Rec., 76):

> "As to the proceedings in the land office, in so far "as the claim of the plaintiff to the Yes You Do is "concerned, the court having held that the location "was void, having held that the locator, J. Fewson "Smith, was not authorized, but prohibited by the "law from making the location, and that the filing "of the adverse claim by him in the land office "would be invalid, the objection to that offer will "be sustained."

To this ruling plaintiff excepted (Rec., 77), and being precluded from introducing any further evidence to sustain the allegations of his complaint rested his case-in-chief (Rec., 77).

Evidence was then introduced on the part of defendants to show the location of the Uhlig No. 1 and Uhlig No. 2 claims on January 1, 1889, their survey and performance of annual assessment-work thereon, together with proof that the defendant The St. Joe Mining Company was the successor in interest in said claims to the defendants Uhlig and McKernan (Rec., 80–116), thus making out a *prima facie* case.

In rebuttal plaintiff produced as witness Andrew P. Mayberry, who testified as to the discovery and location by him of the Levi P. and Veta Lode claims on January 1, 1889, a few minutes after midnight, and his continued possession of said claims, with performance of annual assessment-work thereon, until December 31, 1897, when forfeited by failure to perform annual work for the year 1897 (Rec., 116–130). Plaintiff then again offered in evidence the location notices

of the Levi P. and Veta claims as showing in rebuttal of defendants' testimony as to the validity of the Uhlig locations on January 1, 1889, that the ground therein embraced was covered by valid subsisting locations on that date (Rec., 130, 133), the Levi P. location covering the area here in conflict with the Yes You Do claim, and the Veta location covering the discovery shafts of the Uhlig No. 1 and Uhlig No. 2 claims. To this objection was again made and sustained by the court over plaintiff's exception. (Rec., 130, 134). In rejecting the offered evidence of the Levi P. location certificate the trial court said (Rec., 130):

> "The view I take of the law is this: That in this "case, it stands now as though the applicants for "patent had posted their notice and diagram upon "the claims pending patent proceedings for these "claims in the land office; that the register, upon the "incoming of the proof of posting the notice and "map of the claims, published notice of the appli- "cation of these parties for patent to these claims; "that no adverse claim has been filed, though "through the peculiar conditions which have arisen "in the trial of this case, the plaintiff, who claims "to be the owner of the Yes You Do claim, also "claims that he did file an adverse claim to this "application for patent but on account of the in- "validity of the location notice of the Yes You Do "and the reason that the locator of the claim was dis- "qualified, being a deputy United States mineral sur- "veyor, and couldn't initiate any title by anything he "might do with reference to making a location of the "Yes You Do, the location notice has been rejected "as evidence. Now, that being so, the application "for a patent being unchallenged, the assumption of "the law is that the applicants are entitled to patent "their claims as applied for and third parties will not "be permitted to question the validity of the proceed- "ings to obtain patent, or make any objections, ex- "cept to show that the applicants for a patent have "not complied with the law. The Eureka case, de- "cided in the 4th Sawyer—I don't remember the

"name of it—commonly known as the Eureka case—
"in that case Judge Field held that when a party
"made an application for a patent, any adverse claim-
"ant failing to file his adverse claim within the sixty
"days' period of publication, in which he asserted or,
"rather, defined, the nature and boundaries and ex-
"tent of his adverse claim, that he would be held to
"waive it. And as no adverse claimants are before
"the court to any part or any portion of any land
"embraced within the Uhlig No. 1 and the Uhlig
"No. 2 claims as surveyed and applied for, I don't
"think the location notice of any adjoining or con-
"flicting claim could be heard to determine the right
"of the applicants to a patent in this case. And look-
"ing at the law in this way, I will rule out the loca-
"tion notice of the Levi P."

From the foregoing it will be seen that it was essential to plaintiff's case to prove (1) that on January 1, 1889, the time of the claimed location of the ground here in controversy by Edmund H. Uhlig as the Uhlig No. 1 and Uhlig No. 2 Lode claims, said ground was not unoccupied and unappropriated mineral land of the United States, because of the prior valid location thereof by Andrew H. Mayberry as the Levi P. and Veta Lode claims, the Veta location covering the discovery shafts of the Uhlig No. 1 and No. 2; (2) that said Mayberry held and possessed said ground under the Levi P. and Veta locations and in accordance with the mining laws of the United States up to and including December 31, 1897, performing the annual assessment-work thereon up to and including the year 1896; (3) that said Levi P. and Veta locations became forfeited and subject to relocation on January 1, 1898; (4) that plaintiff's grantor, J. Fewson Smith, Jr., made a valid relocation of said Levi P. and Veta claims on January 1, 1898, as the Yes You Do Lode claim, as authorized by section 2324, U. S. R. S.; (5) that plaintiff is the grantee of said Yes You Do claim under deed from J. Fewson Smith, Jr., and is the present holder and owner of said

claim under said location, deed, and the mining laws of the United States, and (6) that plaintiff duly filed in the U. S. land office at Salt Lake City protest and adverse claim to the ground in controversy within the period of publication on the Uhlig No. 1 and Uhlig No. 2 claims, bringing this action thereon within the statutory period.

The trial court, in excluding the evidence of the Levi P. and Veta locations, the location notice of the Yes You Do claim, the deed from Smith to Lavagnino, conveying the Yes You Do claim, and the evidence of filing protest and adverse claim in the local land office, absolutely precluded plaintiff from establishing his *prima facie* case, and hence rendered impossible any determination of the real issues on the merits of the case.

If Mayberry's locations of the Levi P. and Veta claims were valid and prior in time to the Uhlig locations, no valid relocations thereof could be made until Mayberry's rights or those of his grantees had come to an end. The locations by Uhlig were then made "on lands actually covered at the time by another valid and subsisting location," and hence were void (*Belk vs. Meagher*, 104 U. S., 279, 284). No subsequent acts could validate such void locations and no possessory rights or valid application for patent could be based thereon.

Not only did the rejection of the evidence of the Levi P. and Veta locations prevent any inquiry by the court as to whether the locations by Uhlig were made upon unoccupied and unappropriated ground, an essential element of the right of possession, and which being raised in issue it was the duty of the court to pass upon under section 2326, U. S. Rev. Stats., but it also excluded an essential element of plaintiff's title. As above shown, the Yes You Do claim was in express terms a relocation of the Levi P. (Rec., 135). The prior location, as well as the abandonment and forfeiture, of the Levi P. claim were therefore constituent elements of plaintiff's title to the Yes You Do claim, which he asserts

under the United States mining laws and which has been sweepingly denied by the courts below.

ASSIGNMENTS OF ERROR.

The supreme court of the State of Utah erred:

1. In holding that the location of the Yes You Do Lode mining claim by J. Fewson Smith, Jr., was invalid, because said Smith was at the time of said location a deputy United States mineral surveyor (Rec., 143, 149, 72, 74).

2. In affirming the trial court in excluding from the evidence the notice of location of the Yes You Do Lode mining claim (Rec., 149, 72, 74, 135).

3. In affirming the trial court in excluding from the evidence the deed conveying said Yes You Do Lode mining claim from J. Fewson Smith to the plaintiff, Lavagnino (Rec., 149, 73, 74, 136).

4. In affirming the trial court in refusing to permit the plaintiff to prove that he duly filed in the United States land office a protest and adverse claim in respect to the area in conflict between the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims and the Yes You Do Lode mining claim, and that within thirty days of the filing of the said protest and adverse claim plaintiff commenced this action to determine the right of possession of the area in conflict between said claims (Rec., 149, 74, 76).

5. In affirming the trial court in refusing to permit the plaintiff to prove that at the time the Uhlig No. 1 and Uhlig No. 2 claims were located there was a subsisting valid location known as the Levi P. Lode claim, and that said Levi P. location covered all of the area

in conflict between the Yes You Do and the Uhlig No. 1 and Uhlig No. 2 Lode mining claims, and in excluding from the evidence the location notice of said Levi P. Lode claim (Rec., 149, 74, 76, 130, 131, 134).

6. In affirming the trial court in rejecting evidence offered by the plaintiff to show that the necessary annual expenditure to maintain said Levi P. Lode mining claim was performed up to and including the year 1896, and that in the year 1897, prior to the location of said Yes You Do claim, the owner of said Levi P. claim abandoned all rights thereto and failed to perform any labor thereon for the year 1897 (Rec., 149, 74, 76).

7. In affirming the trial court in refusing to permit the plaintiff to prove that the Veta Lode mining claim was a valid prior location to the Uhlig No. 1 and Uhlig No. 2 Lode mining claims, and included the discoveries of each of said Uhlig No. 1 and Uhlig No. 2 claims, and in excluding from the evidence the location notice of said Veta Lode claim (Rec., 149, 74, 76, 133, 134).

8. In affirming the trial court in refusing to permit the plaintiff to prove that he had performed the annual labor required by law upon the Yes You Do Lode mining claim for the years 1899 and 1900 (Rec., 143, 75, 76).

9. In affirming the trial court in rejecting proof offered by the plaintiff that the title of the Yes You Do Lode mining claim had passed to him from J. Fewson Smith, Jr., prior to the time of the filing of protest and adverse claim (Rec., 149, 75, 76).

10. In affirming the trial court in refusing to permit the plaintiff to prove that plaintiff and his grantor have, since the time of the location of the Yes You Do mining claim,

complied with the laws of the United States and of the State of Utah and the rules and regulations thereunder and those of the West Mountain mining district so as to entitle the plaintiff to the possession of the Yes You Do Lode mining claim, including the area in conflict between said claim and the Uhlig No. 1 and Uhlig No. 2 mining claims (Rec., 143, 75, 76).

11. In holding that the agreement between this plaintiff in error and J. Fewson Smith, Jr., was in violation of section 452 of the Revised Statutes of the United States, and that for that reason, or for any other reason, the conveyance by said Smith of the Yes You Do mining claim to plaintiff in error was invalid (Rec., 144).

12. In holding that the defendant, The St. Joe Mining Company, is entitled to the possession of the ground in conflict between said Uhlig No. 1 and Uhlig No. 2 and said Yes You Do Lode mining claims (Rec., 149, 39).

ARGUMENT.

I.

SECTION 452, U. S. REV. STATS., DOES NOT PROHIBIT THE LOCATION OF A MINING CLAIM BY A UNITED STATES DEPUTY MINERAL SURVEYOR.

Section 452, U. S. Rev. Stats., upon the construction of which the court below based its rulings, is as follows:

> "The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

This statute is manifestly in derogation or restriction of the right conferred by section 2319, U. S. Rev. Stats., on all citizens of the United States and those who have declared their intention to become such, to explore, occupy, and purchase the public mineral lands. It is, therefore, *a statute against common right*, a law denying to a special class of persons the rights or privileges conferred upon the general public, and as such must be strictly construed (*Sutherland's Statutory Construction, sec.* 366; *Endlich's Interpretation of Statutes, sec.* 341).

Adopting such strict construction of the statute, or in fact any reasonable construction thereof, we think it evident that it does not here apply.

A very careful search justifies us in saying that, with the exception of the case at bar, there is no reported decision of any court construing the above statute. The court below, however, in construing the statute as prohibiting locations or entries of public lands by United States deputy mineral surveyors, ruled contrary to the then existing and to the present construction of said statute by the Land Department. We shall hereafter review the decisions of the Land Department in detail.

The prohibition against the purchase of public lands by employees of the General Land Office is first found in the act of April 25, 1812, "For the establishment of a General Land Office in the Department of the Treasury" (2 Stats., 716), section 10 of which enacted that:

> "No person appointed to an office instituted by this "act, or employed in any such office, shall directly or "indirectly be concerned in the purchase of any right, "title, or interest, in any public land, either in his "own right, or in trust for any other person, or in the "name or right of any other person in trust for "himself, nor shall take or receive any fee or emolu- "ment for negotiating or transacting the business of "the office. And any person offending in the prem- "ises against the prohibitions of this act, shall forfeit "and pay one hundred dollars; and, upon conviction, "shall be removed from office."

The act of July 4, 1836, "to reorganize the General Land Office" (5 Stats., 107), provided in section 14 that:

> "All and every of the officers whose salaries are "hereinbefore provided for, are hereby prohibited "from directly or indirectly purchasing, or in any "way becoming interested in the purchase of any of "the public land; and in case of a violation of this "section by such officer, and on proof thereof being "made to the President of the United States, such "officer so offending shall be forthwith removed from "office."

Both the act of April 25, 1812, and the act of July 4, 1836, *supra*, relate solely to the General Land Office—*i. e.*, the governmental bureau in Washington charged with the administration of the public lands and the officers and employees in that bureau; registers, receivers, surveyors general, or other local officers of the Land Department are not included therein. This distinction is preserved in the codification or re-enactment of these provisions in section 452, Rev. Stats., where the prohibition is in terms limited to persons "*in the General Land Office.*"

In the case of *Grandy vs. Bedell*, 2 Land Dec., 314 (1883), Mr. Secretary Teller, quoting section 452, R. S., says (p. 315):

> "It will be observed that the section quoted, and "this is the only statutory provision bearing on the "subject, does not extend to clerks in the district "offices, but by its terms is confined to those employed "in the General Land Office. Your office has, how-"ever, by rule, extended the operation of this statute "so as to include clerks in the local offices; and this "Department held in the case of The State of Nebraska "*vs.* Dorrington (Copp's L. L. 1882, p. 647), the defend-"ant being at the time of making his timber-culture "entry a clerk in a local land office, that such fact "was sufficient ground for the cancellation of the "entry."

The claimant, Bedell, was a receiver's clerk in the local land office at date of making the timber-culture entry in contest, but at date of initiation of contest by Grandy he had resigned his position. The Secretary therefore held:

> "Taking these facts into consideration and the "further one that *he was not by express provision of law "incompetent to make the entry*, I am of the opinion "that it should be permitted to stand."

The instructions issued by Commissioner McFarland August 28, 1883, and reported in 2 Land Dec., 313, clearly shows that in the opinion of the Land Department there was no statutory inhibition against entries of public land by Land Department employés outside of those in the General Land Office. The instructions referred to are as follows:

> "GENTLEMEN: I am in receipt of the receiver's "letter of July 7, 1883, in which the following ques- "tion is submitted to this office: Is it admissible for "a register or receiver or special agent or clerk to "make a timber-culture entry in a district other than "the one in which he is located?
>
> "I reply that I think such entry, excepting as to "special agents, is admissible. The officer or clerk "making such entry should state in his affidavit the "particular position he holds, that the entry may be "intelligently dealt with."

Subsequently, in 1890, the Land Department appears to have modified the views above expressed, holding in the case of *Herbert McMicken*, 10 Land Decisions, 97, and 11 *ib.*, 96, that a clerk in the office of a United States surveyor general was a clerk or employee in the General Land Office, and hence fell within the inhibition of section 452, Rev. Stats. Under the decision in *McMicken's* case, *supra*, a general circular was issued by the Land Department, dated September 15, 1890, and reported in 11 Land Decisions, 348, stating that:

"In accordance with said decision, all officers, "clerks, and employés in the offices of the surveyors "general, the local land offices, and the General Land "Office, or any persons, wherever located, employed "under the supervision of the Commissioner of the "General Land Office, are, during such employment, "prohibited from entering, or becoming interested, "directly or indirectly, in any of the public lands of "the United States."

The above rule has since been generally adhered to by the Department, although in the case of *Winans vs. Beidler*, 15 Land Dec., 266, decided in 1892, the Land Department appears to have again modified its views as to the construction of section 452, Rev. Stats., holding that Winans, who was employed as a copyist in the General Land Office at Washington, could perfect a homestead entry made shortly before his appointment to such position, saying (p. 268):

"The position he holds cannot be said to give him "any advantage, in finally securing the land, over "the general public; his access to the records of the "office can give him no information valuable to him "pertaining to his entry or his rights to the tract; "there is no opportunity afforded him to practice any "fraud; he has nothing to do with the matter of ad-"judicating the question as to his compliance with "the law when that question shall arise, indeed he "may not hold the place he does, or any other place "in the Land Department, when the time arrives to "make final proof. In view of these facts, I am of "the opinion that section 452, *supra*, does not apply "to this case, for I do not believe that Congress in-"tended, by the enactment of said section, to deprive "any one of valuable property rights, theretofore law-"fully vested in him, simply for the reason that, after "such person had made settlement on public land, "and made an entry, or application to enter such land "under the homestead law, he received an appoint-"ment as a copyist in the General Land Office."

At the date of location of the Yes You Do claim, the locator J. Fewson Smith, Jr., was what is commonly known as a United States deputy mineral surveyor—*i. e.*, a person appointed by a United States surveyor general as qualified to make survey of mining claims, under authority of section 2334, U. S. Rev. Stats. The pertinent provisions of that section are as follows:

> The surveyor general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey.

The designation of "United States deputy mineral surveyor" is one unknown to the Federal statutes. It is a term made use of by the Land Department to designate one appointed under the provisions of section 2334, Rev. Stats., "to survey mining claims." Until the passage of the general mining law of May 10, 1872 (17 Stats., 95), no such position had been created. Under the mining law of July 26, 1866 (14 Stats., 252), and until the passage of the act of May 10, 1872, *supra*, it was the duty of the lode claimant to himself prepare and file a diagram of his claim. To obviate the filing of inaccurate and improperly prepared diagrams the applicant for mineral patent was required by the latter act to file with his application plat and field-notes of his claim "showing accurately the boundaries" (sec. 2325, Rev. Stats.), and the surveyors appointed under section 2334, R. S., *supra*, were designated as persons competent to prepare such plat and field-notes. But in making such plat and field-notes the

mineral surveyor acts not as an employee of the Government, but as the agent and employee of the mineral applicant. The surveyor appointed under section 2333, R. S., has no functions whatsoever outside of the survey of mining claims by the private individuals who employ him. He has no access to the official records of the surveyor general's office other than that afforded any private individual. He does no work for the Government and receives no compensation therefrom. His functions begin and end with the survey of mining claims for those individuals who retain his services. No scale of fees or compensation is fixed either by statute or departmental regulation. Remuneration for his services is entirely a matter of private arrangement with the mineral applicant.

The statute does not require a surveyor appointed under this section to give a bond or take an oath, but the regulations of the Department provide that he shall give bond at the time of his appointment, and that he shall make oath as to the correctness of each survey executed by him. The Government does not furnish him with any work; supply him with instruments; require him to keep open an office for the benefit of the public; pay him any compensation for his services, or reimburse him for his expenses. His time is entirely his own. He may never make a survey after receiving his appointment, or he may make fifty or more a year. If he makes a survey, it is under a private contract with the owner of the claim. Neither the surveyor general, nor the Commissioner of the General Land Office, nor the Secretary of the Interior has any power to compel a surveyor to survey any mining claim. His field-notes have no official character until they have been approved by the surveyor general; but before they receive that character—that is, as soon as they are filed in the office of the surveyor general—the duties of the deputy mineral surveyor cease.

The following are the pertinent regulations of the Land Department relative to deputy mineral surveyors, their ap-

pointment and duties, as set forth in the General Mining Circular, approved December 18, 1903 (31 Land Decisions, 453, 489; 32 *ib.*, 367):

"90. The surveyors-general of the several districts will, in pursuance of law, appoint in each land district as many *competent* surveyors for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The statute provides that the claimant shall also be at liberty to employ any United States deputy surveyor to make the survey. Each surveyor appointed to survey mining claims before entering upon the duties of his office or appointment shall be required to enter into such bond for the faithful performance of his duties as may be prescribed by the regulations of the Land Department in force at that time."

"92. The surveyor-general will endeavor to appoint surveyors to survey mining claims, so that one or more may be located in each mining district for the greater convenience of miners."

"93. The usual oaths will be required of these surveyors and their assistants as to the correctness of each survey executed by them."

"The duty of the surveyor ceases when he has executed the survey and returned the field-notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim."

"The surveyors-general and local land officers are expected to report any infringement of this regulation to this office."

"94. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with a view of correcting the abuse."

"115. Under section 2334, U. S. Rev. Stats., the U. S. surveyor-general 'may appoint in each land district

containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims.'"

"116. Persons desiring such appointments should therefore file their applications with the surveyor-general for the district wherein appointment is asked, who will furnish all information necessary."

"117. All appointments of deputy mineral surveyors must be submitted to the Commissioner of the General Land Office for approval."

"118. The surveyors-general have authority to suspend or revoke the commissions of deputy mineral surveyors for cause. Before final action, however, the matter should be submitted to the Commissioner of the General Land Office for approval."

"119. Such surveyors will be allowed the right of appeal from the action of the surveyor-general in the usual manner. Such appeal should be filed with the surveyor-general, who will at once transmit the same, with a full report, to the General Land Office."

"120. Neither the surveyor general nor the Commissioner of the General Land Office has jurisdiction to settle differences, relative to the payment of charges for field-work, between deputy mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner, *i. e.*, in the local courts. The Department has, however, authority to investigate charges affecting the official actions of deputy mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment."

"121. The surveyors-general should appoint as many competent deputy mineral surveyors as apply for appointment, in order that claimants may have a choice of surveyors, and be enabled to have their work done on the most advantageous terms."

"123. In cases where the error in the original survey is due to the carelessness or neglect of the surveyor who made it, he should be required to make the necessary corrections in the field at his own expense, and the surveyor-general should advise him that the penalty for failure to comply with instructions within a specified time will be the suspension or revocation of his commission."

"124. Mineral surveyors will address all official communications to the surveyor-general. They will, when a mining claim is the subject of correspondence, give the name and the survey number. In replying to letters they will give the subject-matter and date of the letter. They will promptly notify the surveyor-general of any change in post-office address."

"125. Mineral surveyors should keep a complete record of each survey made by them and the facts coming to their knowledge at the time, as well as copies of all their field-notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time. Field-notes and other reports must be written in a clear and legible hand or typewritten, in non-copying ink, and upon the proper blanks furnished gratuitously by the surveyor-general's office upon application therefor. No interlineations or erasures will be allowed."

"126. No return by a mineral surveyor will be recognized as official unless it is over his signature as a United States deputy mineral surveyor, and made in pursuance of a special order from the surveyor-general's office. After he has received an order for survey he is required to make the survey and return correct field-notes thereof to the surveyor-general's office without delay."

"127. The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same."

"128. A mineral surveyor is precluded from acting, either directly or indirectly, as attorney in mineral claims. His duty in any particular case ceases when he has executed the survey and returned the field-notes and preliminary plat, with his report, to the surveyor general. He will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. He is not permitted to combine the duties of surveyor and notary public in the

same case by administering oaths to the parties in interest, but as a notary public he may administer the oaths to his assistants in making the survey; otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor. He will make no survey of a mineral claim in which he holds an interest, nor will he employ chainmen interested therein in any manner."

From the foregoing statement of the *status* and functions of United States deputy mineral surveyors, under the Federal statutes and the regulations of the Land Department, it is, we think, manifest that such persons are neither "officers, clerks nor employees in the General Land Office" within the meaning of section 452, Rev. Stats.

(1.) *A deputy mineral surveyor is not an officer.*

In the leading case of *United States vs. Germaine*, 99 U. S., 508, this court, by Mr. Justice Miller, laid down the definition of a Federal officer, saying (p. 509):

> "The Constitution for purposes of appointment very "clearly divides all its officers into two classes. The "primary class requires a nomination by the Presi- "dent and confirmation by the Senate. But foresee- "ing that when offices became numerous, and sudden "removals necessary, this mode might be inconve- "nient, it was provided that in regard to officers in- "ferior to those specially mentioned, Congress might "by law vest their appointment in the President "alone, in the courts of law, or in the heads of depart- "ments. That all persons who can be said to hold "an office under the Government about to be estab- "lished under the Constitution were intended to be "included within one or the other of these modes of "appointment there can be but little doubt."

In that case the defendant Germaine, who was a civil surgeon appointed by the Commissioner of Pensions under sec. 4777, Rev. Stats., was indicted for extortion as an officer of

the United States, but the court held that he was not such officer, saying further (p. 511):

"If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case [*United States vs. Hartwell*, 6 Wall., 385], the court said, the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and *permanent*, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised.

"No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the Commissioner. He is but an agent of the Commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the Commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

"We answer that the defendant is not an officer of the United States, and that judgment on the demurrer must be entered in his favor."

Again in *United States vs. Smith*, 124 U. S., 525, this court said (p. 532):

> "An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law or the head of a Department. A person in the service of the Government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in *United States vs. Germaine*, 99 U. S., 508, and in the recent case of the *United States vs. Mouat, ante*, 303. What we have here said is but a repetition of what was there authoritatively declared."

Applying the rule laid down in the above decisions of this court, it is clear that a deputy mineral surveyor is not an "*officer*" within the meaning of section 452, Rev. Stats.

(2.) *Equally apparent is it that a deputy mineral surveyor is not a "clerk," either in the General Land Office or in any public office subordinate to it.*

> "A clerk is one employed in an office, public or private, for keeping records and accounts, whose business it is to write or register, in proper form, the transactions of the persons, tribunal or body for which he is clerk."
>
> *Bouvier Law Dict.*
>
> *People vs. Fire Commissioners*, 73 N. Y., 422.

The duties of a mineral surveyor are exclusively professional and in no sense those of a clerk. He keeps no records or accounts, he registers no act of any superior, he has no custody of public property or papers. His duties consist, when employed by the owner of a mining claim, in making for such owner a survey thereof, showing improvements thereon, with preliminary plat and field-notes of survey. When the field-notes and preliminary plat of survey have

been filed with the surveyor general his duty in the premises is ended, except it be to correct an error made by him. The final plat of survey, with copy thereof and transcript of field-notes, is prepared by the salaried clerks in the surveyor general's office. Thus it will be seen that the first duties performed by any clerk in the surveyor general's office or any branch of the Land Department are performed after the mineral surveyor's work has been completed and he has no part whatever therein.

The term "clerk" has a perfectly definite meaning, which excludes absolutely one employed as a surveyor or in other purely professional capacity.

(3.) *Coming now to a consideration of the still more comprehensive term "employé," we find that it also cannot apply to a deputy mineral surveyor.*

The Century Dictionary thus defines an employé:

> "One who works for an employer; a person working for salary or wages, applied to anyone so working; but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or a domestic servant."

An employé is one who is paid wages as distinguished from salary.

People vs. Meyers, 33 N. Y. R., 18.

It will be observed that the touchstone of the above definition is the "working for salary or wages."

(a.) *The rendition of work or services is an essential element of employment.*

Unless work be done or services rendered in return for compensation there is no employment. Without the performance of work or service any money paid is a mere gratuity, and the receiver thereof is in no sense an employé.

A deputy mineral surveyor renders no service to, or performs no work for, the United States. *He is by law prohibited from doing so if he would.* There has never been an appropriation providing for the payment of a single dollar to deputy mineral surveyors. Paragraph 127 of the Mining Regulations quoted above states:

> "The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same."

Section 5 of the act of August 15, 1876, ch. 287 (19 Stats., 169), provides that—

> "The executive officers of the Government are hereby prohibited from employing any clerk, agent, engineer, draughtsman, messenger, watchman, laborer, *or other employé*, in any of the executive departments in the city of Washington *or elsewhere*, beyond provisions made by law."

The act of May 1, 1884, ch. 37 (23 Stats., 17; 1 Supp. Rev. Stats., 427), provides that—

> "Hereafter no Department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property."

(*b.*) *An employé must receive salary or wages.*

The word, "when used in respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for compensation, and has but this one meaning when used in the ordinary affairs and business of life."

McCluskey vs. Cromwell, 11 N. Y., 593.

"Salary," as defined in the Century Dictionary, is—

> "The recompense or consideration stipulated to be "paid to a person periodically for services, usually a "fixed sum to be paid by the year, for year or "quarter."

The word "wages" is defined in the Century Dictionary as:

> "That which is paid for a service rendered; what "is paid for labor; hire; now usually in the plural. "In common use the word 'wages' is applied specif- "ically to the payment made for manual labor or "other labor of a menial or mechanical kind."

A mineral surveyor receives from the Government neither salary nor wages as above defined nor any compensation whatever, and is not therefore an employé of the Government. Unless the Government would be liable for his compensation, either originally or upon default of the applicant who engaged his services, he does not sustain that relation to the Government.

In *United States vs. Meigs*, 95 U. S., 748, suit was brought in the Court of Claims by Meigs, a deputy clerk of the supreme court of the District of Columbia, to recover an additional compensation allowed to employés of the Government by joint resolution of February 28, 1867 (14 Stats., 569). This court held that Meigs was not an employé of the Government, since he was appointed by the clerk of the court and was paid by him, Mr. Justice Miller saying (p. 749):

> "The deputy clerk Meigs, whose case is the prin- "cipal one, was appointed by the clerk of the court, "and the latter was appointed by the court. The "deputy served at a salary fixed by contract between "him and the clerk. He was also paid by the clerk, "and worked for the clerk, and performed services "which it was the duty of the clerk to perform, and "for which the clerk received compensation by fees "paid by the litigants for whom those services were

"rendered. It is very difficult to see how this deputy
"clerk can be called an employé of the Government
"at all. The Government was never liable to him
"for any salary at any time, and, if the principal
"clerk had failed to pay him the $2,000, the Govern-
"ment clearly would not have been liable for it."

And it was so ruled with respect to deputy marshals in *Ex parte Simons*, 32 Fed. Rep., 681, and *Powell vs. United States*, 60 Fed. Rep., 687.

In *United States vs. McDonald*, 21 C. C. A., 347; 72 Fed. Rep., 898, McDonald sued the United States for compensation as a clerk in the office of the U. S. attorney for the district of Montana. The court held that he was not an employé of the United States and must look to the district attorney for his compensation, Hawley, D. J., saying:

"The facts of this case present the question whether
"there is such a privity between McDonald and the
"Government as to authorize him to maintain an ac-
"tion against the United States for the services ren-
"dered by him as a clerk in the office of the United
"States attorney for the district of Montana. The
"United States never employed McDonald to perform
"any services, legal or clerical, in their behalf. It is
"true that the Attorney General gave authority to
"the United States attorney for the district of Mon-
"tana to appoint McDonald as a clerk in his office to
"assist him in the discharge of his duties as district
"attorney, at a named salary; but this authority was
"given upon the express condition that McDonald
"'is to understand that he can have no account
"'against the United States for services, but is to look
"'exclusively to the district attorney for his compen-
"'sation.' This authority is conclusive. Its true in-
"terpretation and meaning govern the question."

(c.) The idea of continuity of service is inseparable from the word "employé." An employé is not one who renders an occasional service, in a particular case.

As said by Mr. Justice Brewer in delivering the opinion of the court in *Louisville, &c., R. R. Co. vs. Wilson*, 138 U. S., 501, 505:

> "The terms 'officers' and 'employés' both, alike, "refer to those in regular and continual service. "Within the ordinary acceptation of the terms, one "who is engaged to render service in a particular "transaction is neither an officer nor an employé. They "imply continuity of service, and exclude those em- "ployed for a special and single transaction. An at- "torney of an individual, retained for a single suit, "is not his employé. It is true, he has engaged to "render services; but his engagement is rather that "of a contractor than that of an employé."

The same rule was laid down by this court in *Auffmordt vs. Hedden*, 137 U. S., 310, in which the court, passing upon the *status* of a "merchant appraiser" appointed or selected by the collector of customs under authority of section 2930, Rev. Stats., and whose compensation was payable by the importer, said (p. 326):

> "The merchant appraiser is an expert, selected as "an emergency arises, upon the request of the im- "porter for a re-appraisal. His appointment is not one "to be classified under the civil-service law, he is not "to be appointed on a competitive examination, nor "does he fall within the provisions of the civil-service "law. He is not a 'clerk,' nor an 'agent,' nor a 'per- "son employed,' in the customs department, within "the meaning of section 6 of the civil-service act; "nor is he an officer of the United States, required to "be appointed by the President, or a court of law, or "the head of a Department. He is an expert selected "as such. Section 2930 requires that he shall be a "'discreet and experienced merchant,' 'familiar with "the character and value of the goods in question.' "He is selected for the special case. He has no gen- "eral functions, nor any employment which has any "duration as to time, or which extends over any case "further than as he is selected to act in that particu-

"lar case. He is an executive agent, as an expert as-
"sistant to aid in ascertaining the value of the goods,
"selected for the particular case on the request of the
"importer, and selected for his special knowledge in
"regard to the character and value of the particular
"goods in question. He has no claim or right to be
"designated, or to act except as he may be desig-
"nated."

(*d.*) The use of the word "employé" implies the relation of master and servant.

State vs. Emerson, 72 Maine, 455.

"The relation of master and servant, in its full
"sense, invariably and only arises out of a contract,
"expressed or implied, between the master on the one
"hand and the servant on the other."

Wood on Master and Servant, section 4.

But a mineral surveyor does not pass this test. He has no contract with the Government. He does have a contract with the applicant, and he is therefore an employé of the applicant if of anybody; but he is certainly not an "employé in the General Land Office."

(*e.*) The nature of a mineral surveyor's work precludes him from being designated as an "employé" of the Government, or of any one else.

"Employés are usually considered as embracing
"laborers and servants and those occupying inferior
"positions."

People vs. Meyers, 33 N. Y. S. R., 18.
People vs. Board of Police, 75 N. Y., 41.

In *Macfie vs. Hutchinson* (12 Ont. Pr. Rep., 167), O'Connor, J., in delivering the opinion of the court, said:

"The word employé, or employee as the statute has
"it, is not a legal term, nor is it an English word, but
"a word imported, with its native pronunciation from

"the French language, which is frequently used by "English-speaking people as a convenient common- "place term to designate the relation or situation of a "class of persons who are not precisely menial serv- "ants, but whose whole time and services are em- "ployed and paid for by another person or persons, "or by a corporation, or by the Government. * * * "It seems to me too clear for mistake that the term "employé cannot in its ordinary acceptation be ap- "plied to members of any of the learned professions. "As a fact, I think it is never in common usage ap- "plied by either the learned or the unlearned to a "practicing physician, a lawyer, a clergyman, *a sur- "veyor*, or a civil engineer, practicing his profes- "sional avocation or what pertains thereto."

The surveyor's duties have already been described herein, and it was shown that he is an independent worker, pursuing a calling that demands a high degree of professional education and skill, accomplishing his duties by the use of his own capital and his own expensive instruments and employing at his own outlay his own assistants. He undertakes to produce in his own way, at a time to be chosen by himself and by means determined by himself, a certain result, viz., a survey. He is, therefore, not an employé, but a contractor.

"Since, to constitute the relation of master and serv- "ant, the volitions of the latter must be presump- "tively or in fact controlled by the former, a con- "tractor who simply undertakes to bring about a re- "sult after his own methods, is not a servant."
Bishop on Non-Contract Law, sec. 602.
Campfield vs. Lang, 25 Fed. Rep., 128.

If a mineral surveyor be held to be an employé of the Government, then his own assistants employed by him upon the survey are also employés of the Government and subject to the prohibition of section 452. The absurd result would follow that nobody could hold a rod or carry a chain in a

mineral survey without forfeiting his right to enter public lands.

A partial reservation of authority or control in certain respects does not transform the contractor into a mere servant.

Wood on Master and Servant, 618.
Cooley on Torts, 548.
Wharton on Agency, secs. 19, 20.

Thus, the requirements that the survey be made in conformity to the general rules of the General Land Office and the instructions of the surveyor general; that lumber be sawed according to directions given; that a railroad contractor do his work under the supervision and to the satisfaction of the chief engineer, or a builder under the supervision of the architect, or a plumber under the supervision of an official known as the inspector of plumbing—none of them make a contractor a mere employé of anybody.

Where a contractor to grade a street "agreed to conform "the work to such further directions as should be given by "the street commissioner and one of the city surveyors" (which is as full power and authority as is exerted over a deputy mineral surveyor by the surveyor general or any other officer of the Land Department), the court held:

> "This clause in the contract does not in any man-
> "ner affect the case. It does not constitute Foster
> "(the contractor) any more the immediate agent or
> "servant of the defendant than if the provision were
> "not inserted in his contract."
>
> *Pack vs. Mayor, etc., of New York*, 8 N. Y., 222.
> *Kelly vs. Mayor, etc., of New York*, 11 N. Y., 432.

In *Kearney vs. Oakes et al.*, 18 Canada Sup. Ct., 148, a contractor with the Dominion Government for the construction of a government railway, being sued for acts performed by him in the execution of said government work, pleaded that he was an "employé" of the government and entitled to certain notice as such employé. His services seem to have

been analogous to those of a deputy mineral surveyor, viz. to do government work on government land, though, unlike the surveyor, he was paid by the government. But the court held that "employé" means "servant" and nothing more.

> "When a man is employed in doing a job or a "piece of work with his own means, and his own "men, and employs others to help him or to execute "the work for him and under his control, he is the "superior who is responsible for their conduct, no "matter whom he is doing the work for."
> *Blake vs. Ferris*, 5 N. Y., 58.

The Pennsylvania statute of 1802 provided "that every "person who shall hold any office, or appointment of profit "or trust, under the Government of the United States, "whether a commissioned officer or otherwise, a subordi-"nate officer or agent, who is or shall be employed under "the legislative, executive or judicial departments of the "United States * * * is hereby declared to be incapa-"ble of holding or exercising, at the same time, the office or "appointment of * * * alderman of any city * * * "under this Commonwealth."

One Binns having been elected alderman, the question as to his right to hold said office was raised by *quo warranto*, the fact being that he had received an "appointment" by the Secretary of State of the United States to publish the laws of the United States. His compensation was also received direct from the United States. But the supreme court of Pennsylvania held in *Commonwealth vs. Binns*, 17 Serg. & Rawle, 220:

> "That the case does not come within the words of the "act of assembly, nor within the meaning of it; that "John Binns holds merely a contract under the Fed-"eral Government, an extensive job of work, as "printer of a newspaper, implying such trust only as "is ordinarily implied in contracts for work; and that

"it is neither an office, nor appointment or employ-
"ment in the nature of an office, incompatible with
"the office of alderman, under the act of assembly of
"1802."

Where a New Jersey statute gave a lien upon the assets of corporations to their employés, the court, in *Lehigh Coal & Nav. Co. vs. C. R. R. Co. of N. J.*, 29 N. J. Eq., 255, held:

"He who furnishes the labor or service of others,
"under a contract to do the whole business of a cor-
"poration, or a particular branch of it, is neither
"within its words nor its spirit."

And construing a similar statute of Indiana, in *Vane vs. Newcomb*, 132 U. S., 220, 233, in language absolutely controlling in the present case, this court said:

"It seems clear to us that Vane was a contractor
"with the company, and not an employé within the
"meaning of the statute. We think the distinction
"pointed out by the circuit court is a sound one,
"namely, that to be an employé within the meaning
"of the statute Vane 'must have been a servant,
"'bound in some degree at least to the duties of a
"'servant, and not,' as he was, 'a mere contractor,
"'bound only to produce or cause to be produced a
"'certain result,—a result of labor to be sure,—but
"'free to dispose of his own time and personal efforts
"'according to his pleasure, without responsibility to
"'the other party.'"

And even where a man, employed in printing the paper money of the United States, worked in a Government building, on material furnished by the Government, and was paid by the Government, he was held, because he employed an assistant, to be not an employé, but a contractor.

Twenty Per Cent. Cases, 20 Wall., 179.

(4.) *The departmental ruling.*

As has been shown, the decisions of the Land Department upon the general scope of section 452, Rev. Stat., have been entirely contradictory, the Department holding, until the decision in the McMicken case, *supra*, in 1890, that the statutory prohibition only extended to persons employed in the General Land Office itself—*i. e.*, the governmental bureau in Washington—not to officers or employees in local offices of the Land Department. In McMicken's case the Department held that a salaried clerk in the office of the surveyor general of Washington Territory was prohibited by the statute from purchasing public lands. It was not, however, until February, 1898, *after the date of the location of the claim here in question*, that the Department held, in *Floyd vs. Montgomery*, 26 L. D., 122, that a deputy mineral surveyor was prohibited by statute from making entry of a mining claim.

The first reported case in which the Land Department passed upon the right of a deputy mineral surveyor to make entry of lands is *Denison vs. Willits*, 11 Copp's L. O., 261 (1884), in which Commissioner McFarland said:

> "There seems to be no valid objection as to the "right of a deputy surveyor to make a mineral entry, "in which case he cannot act in any other capacity "than that of claimant."

The next case in which the question arose was that of Lock Lode, 6 L. D., 105, wherein the Secretary said:

> "But one question is in this case, viz: The right of "a deputy mineral surveyor to make a mineral entry "in the district for which he is appointed."

He then quotes section 2319, Revised Statutes, declaring all mineral deposits on public lands to be open to exploration and purchase, and adds:

> "Section 2325 of the U. S. Revised Statutes pro- "vides that any one authorized to *locate* a mineral

"claim may procure a patent for the same upon com-
"pliance with certain requirements and conditions
"therein specified.

"Deputy surveyors are appointed by the surveyor
"general of each surveying district, under and by
"virtue of the authority conferred in section 2334 of
"the U. S. Revised Statutes. Under this section the
"surveyor generals of the several districts appoint as
"many competent deputy surveyors for mining claims
"as may apply to them for such appointment, and
"give bond in the sum of $10,000 for the faithful per-
"formance of their duties. A mineral claimant then
"has the option of employing any one of said depu-
"ties to do his surveying with whom he can make a
"suitable contract, it being always understood that
"the claimant is to bear all the expenses of notices,
"surveys, &c.

"It was ruled by your office, February 6, 1884, in
"the case of Denison and Willits (11 C. L. O., 261)—
"the only time the question has ever been raised, so
"far as can now be ascertained—that a deputy min-
"eral surveyor may make mineral land entries in his
"own district, but in that event he cannot act in any
"other capacity than that of claimant.

* * * * * * *

"It would seem that there can be no valid objection
"to this entry as a matter of public policy, unless it
"be said that claimant's position as a deputy surveyor
"gives him an advantage over the rest of the com-
"munity in locating claims—in other words, his posi-
"tion gives him special information as regards the
"places where valuable minerals are to be found. I
"am not of opinion, however, that this objection
"should be sufficient to work a forfeiture of an entry
"already made, or to prevent the making of one."

This ruling of the Land Department remained in full force without any modification until the decision in *Floyd vs. Montgomery, supra.* In that case a deputy mineral surveyor was one of seven coapplicants for patents on a mining claim. His interest in the claim was acquired after location and

immediately prior to application for patent. He made the survey and prepared and filed preliminary report and field-notes with report on improvements. It being urged that he was disqualified by section 452, Revised Statutes, from obtaining patent, the Secretary directed that the deputy mineral surveyor's name be stricken from the final certificate, and the entry passed to patent in the name of the remaining coapplicants, saying (p. 136):

> "In Herbert McMicken *et al.* (10 L. D., 97, on review 11 L. D., 96) Secretary Noble held that an officer, clerk or employee in the office of a United States surveyor general is an officer, clerk or employee in the General Land Office within the meaning of this section; in Muller *v.* Coleman (18 L. D., 394) Secretary Smith held that a deputy surveyor is such an employee, and in the Neill case (24 L. D., 393), the present Secretary held that a surveyor general is within the inhibition so declared. A circular of similar import was issued September 15, 1890 (11 L. D., 348). From an examination of these authorities and a consideration of the language and manifest purpose of the section, it seems clear that its prohibitive provisions embrace a deputy mineral surveyor. In so far as the cases of State of Nebraska *v.* Dorrington (2 C. L. L., 647; Dennison and Willits (11 C. L. O., 261), and Lock Lode (6 L. D., 105), are in conflict with the views expressed in these later cases they are overruled."

In *Frank A. Maxwell*, 29 L. D., 76, and *Alfred Baltzell, ib.*, 333, the Department again ruled that a deputy mineral surveyor was disqualified by the statute from making entry, basing said decision solely on *Floyd vs. Montgomery, supra.*

The next and last ruling of the Department on this question was in the case of *W. H. Leffingwell* (30 L. D., 139), 1900, holding (*syllabus*) that—

> "A deputy mineral surveyor who has no interest, real or contingent, in a mining claim at the date of the survey thereof by him, nor at the date of the

"application for patent thereto, but who subsequently "makes entry thereof, does not come within the spirit "of section 452 of the Revised Statutes, prohibiting "employees of the General Land Office from 'pur- "chasing or becoming interested in the purchase of "the public land.'"

The Secretary saying:

"Without at the present time considering the cor- "rectness of the conclusion arrived at in the case of "*Floyd et al. vs. Montgomery et al.* (26 L. D., 122, 136), "and similar cases, in so far as it was therein held "that the prohibitive provisions of said section em- "brace a deputy mineral surveyor, it is sufficient to "say that the facts in this case, as disclosed by the "record, are materially different from those stated in "the cases referred to.

"Independently of the statute it would be within "the power of the Land Department in making regu- "lations for the survey of mining claims to provide "against the survey thereof by one interested in the "claim, the reason therefor being manifest. In the "case under consideration Leffingwell had no inter- "est, real or contingent, in the claims involved at the "date of the survey thereof by him, or at the date of "the application for patent thereto, and under these "circumstances it is not believed that he is within the "spirit of the statute or circular above quoted."

It thus appears that until 1898 and after the location of the claim here in question no doubt was expressed by the Land Department as to the right of a deputy mineral surveyor to make a mineral entry, the Department in two decisions expressly ruling that he had such right. In *Floyd vs. Montgomery, supra*, the Department reversed its previous decisions and held that a mineral surveyor was prohibited by the statute from making entry. In 1900 this latter ruling was again reversed, in effect if not in express terms, the Department holding that where the mineral surveyor had no interest in the claim at date of survey and

application he could subsequently make entry thereof. *And this stands the rule of the Land Department today as it was at date of both decisions in this case.*

Manifestly, if a deputy mineral surveyor can, as owner of a claim, make entry thereof by purchase from the Government, he is not within the class of persons prohibited by section 452, Rev. Stats., from purchasing public lands, and a requirement by the Department that he shall not make the survey of the claim he seeks to purchase is a mere administrative regulation without basis in statutory requirement.

A review, then, of *all* cases shows that the only authority in support of the ruling of the court below is the decision of the Land Department in *Floyd vs. Montgomery, supra*, a decision made after the date of the Yes You Do location and which has since been reversed. The ruling of the Land Department stands now as, with the exception of a brief period, it has always stood since the passage of the mining law of 1872, that a deputy mineral surveyor is not, *as such*, prohibited from purchasing public lands.

(5.) *The purpose of the statute.*

We have shown that, by any fair interpretation of its terms, the statute does not include United States deputy mineral surveyors within its inhibition. It is equally clear that it was not within the contemplation or purpose of the Congress to forbid the acquisition of the public lands by such persons. The construction of the court below is alike violative of the spirit and the letter of the statute.

The object of the statute is thus stated by Secretary Noble in *Herbert McMicken's* case, 10 Land Dec., 97, 99:

> "The object of sec. 452 was evidently to remove
> "from the persons designated the temptation and the
> "power by virtue of the opportunities afforded them
> "by their employment to perpetrate frauds and ob-
> "tain an undue advantage in securing public lands
> "over the general public by means of their earlier

"and readier access to the records relating to the dis-
"posal of, and containing valuable information as to,
"such lands."

A deputy mineral surveyor has no access to the records of the surveyor general's office, the local land office, the General Land Office, or the office of the Secretary of the Interior, other or greater than those enjoyed by private citizens generally. In his practice as a mineral surveyor he comes in contact with the Land Department only in the specific case or cases in which his services have been engaged by intending mineral claimants. In such connection he may have access to the official plats of survey and other non-confidential records which have a bearing on the case in which he has been employed, precisely as may his principal. To such records any interested individual may have as ready access. An attorney practicing before the Land Department is given equal opportunity to examine all non-confidential records of the Department, or any of its bureaus, having a bearing upon his client's case, and in so far as proper is facilitated in his examination by the officials and employés in charge. Yet it cannot be contended that an attorney, because practicing before the Land Department, is therefore precluded from exercising the rights and privileges conferred on all citizens with respect to the acquisition of the public lands. It is possible, of course, that an attorney may abuse the privilege thus allowed him by the Department, and, if so, the remedy or the penalty is plain, and is expressly provided for in the departmental regulations and rules of practice, viz., disbarment. And so if a deputy mineral surveyor in anywise misconducts himself in practicing before the Department his license or appointment may, on cause shown, and as expressly provided in the regulations above quoted, be suspended or revoked. In no way, however, can the deputy mineral surveyor obtain any information from which the general public is excluded. His position as respects the

records, correspondence, and other papers in the several branches of the Land Department is strictly that of an outsider, and the position which he holds gives no advantage over other citizens in the purchase or acquisition of the public lands. It is obvious, therefore, that there is no reason why he should be prohibited from purchasing such lands, and that the Congress never contemplated any such result.

(6.) *The true status of the deputy mineral surveyor.*

Analysis of the statute (sec. 2334, R. S.), and of the departmental regulations relative to deputy mineral surveyors, and of the functions of such persons in relation to the Land Department and to those employing them, shows that their *status* as regards the Government of the United States and the Land Department is that of *mere licensees.*

The Government furnishes him no work at any time. It cannot command him to do any work. It cannot accept any work or service from him (act May 1, 1884, ch. 37; 1 Supp. Rev. Stats., 427). He is simply authorized to act in behalf of applicants for mineral patents in certain of the necessary preliminary proceedings before the Land Department.

The position of a mineral surveyor is entirely similar to that of an attorney practicing before the Department. Each may be said in a vague and general way to be an "officer" of the Department, but not such an officer as the statute contemplates. The function of each is the same, viz., to assist an applicant in his proceedings to obtain title to his land from the United States. Each, before he is permitted to act, is required to pass a test of his competency to render such assistance. Each is required by the regulations of the Department, though not by statute, to take an official oath. Each then receives an official paper authorizing him so to render service to applicants for patent. Each thereupon makes with the applicant a contract, express or implied, for

his compensation—a contract with which the Government has nothing to do.

In pursuing his duties each prepares, under his private contract, certain papers which remain his private papers and have no official character until formally placed on file in a Government office. Each is liable to be called to account by the Department for misconduct in his so-called "office," and upon being found guilty each is liable to the only punishment which the Department can inflict, viz., the withdrawal of the privilege of assisting claimants to obtain their title. In the prosecution of his work each is entitled to consult such books, papers, and records of the Land Department in its several branches as may bear upon the particular case upon which he is engaged, and no other books, papers, or records.

If a mineral surveyor is within the prohibition of section 452, an attorney must be held to be equally so, and indeed he is more nearly an officer of the United States, since he received his appointment to practice from the head of a Department, and not from a subordinate official. Yet it will hardly be asserted that an attorney is within the prohibition.

II.

EVEN IF THE PROHIBITION OF SECTION 452 OF THE REVISED STATUTES IS APPLICABLE TO DEPUTY MINERAL SURVEYORS, TITLE TO THE YES YOU DO CLAIM IS NEVERTHELESS GOOD IN THE PRESENT HOLDER, THE PLAINTIFF IN ERROR.

The proof offered (Rec., 46, 136) shows that by deed dated the 5th day of September and recorded October 17, 1898, in the land records of Salt Lake county, Utah, J. Fewson Smith, the locator of the Yes You Do claim, before the initiation of this proceeding and the filing of the adverse claim, conveyed all his right, title, and interest therein to the plaintiff

in error, Lavagnino. Mr. Lavagnino is a citizen of the United States (Rec., 45, 46), and there is no contention that he is in any way disqualified from acquiring title under the mining laws.

Conceding, merely for the argument, that section 452, Rev. Stats., has any application to United States deputy mineral surveyors, the title to the Yes You Do claim, initiated by the location of Deputy Mineral Surveyor Smith, is good in the hands of a person qualified to take and hold under the mining laws. The decisions of this court would seem conclusive as to this.

In *Manuel vs. Wulff*, 152 U. S., 505, this court, reversing the supreme court of Montana, held that an alien could take and hold the possessory title under a mining location, subject to question in regard to his citizenship by the Government only.

And in the later case of *McKinley Creek Mining Co. vs. Alaska United Mining Co.*, 183 U. S., 563, the court held that the locator of a mining claim acquires his possessory title therein by purchase. In that case the court, by Mr. Justice McKenna, said (p. 571):

> " In *Manuel v. Wulff*, 152, this court sustained the " validity of a conveyance of a mining location to an " alien, reversing a decision of the supreme court of " Montana to the contrary. The decision was based " upon the difference between a title by purchase and " title by descent, and the doctrine expressed that an " alien can take title by purchase and can only be " divested of it by office found.
>
> * * * * * * *
>
> " That grantees of the public land take by purchase " this court, in *Manuel v. Wulff*, left no doubt. It was " said that when a location is perfected it has the effect " of a grant by the United States of the right of present " and exclusive possession. *Forbes v. Grady*, 94 U. S., " 762; *Belk v. Meager*, 104 U. S., 279; *Gwillim v.*

" *Donnellan*, 115 U. S., 45; *Noyes v. Mantel*, 127 U.S.,
" 348.

* * * * * * *

" *The meaning of Manuel v. Wulff, is that a location by*
" *an alien, and all the rights following from such location*
" *are voidable, not void, and are free from attack by any*
" *one except the Government.*"

The legal effect of the disqualification of alienage and of that resulting from section 452, Rev. Stats., would appear entirely similar. An alien is disqualified from acquiring title under the mining laws by *exclusion* from the grant of section 2319, Rev. Stats., which is limited to " citizens of the United States and those who have declared their intention to become such." The persons described in section 452, Rev. Stats., are disqualified by reason of their *inclusion* in the prohibition of the statute. The disqualification is no greater, no less, in the one case than in the other. Since, then, " a location by an alien and all the " rights following from such location are voidable, not void, " and are free from attack by any one except the Govern-" ment," it certainly seems that a similar rule should be applied to a location by one who is under the disability created by section 452, Rev. Stats.

It is the long-settled rule that an alien, though disqualified from holding real property, may nevertheless by deed convey a perfect title thereto, and that the purchaser's title cannot be attacked on the ground of the disability of his grantor.

Until office found, an alien " may sell and convey or devise the lands, and pass a good title to the same " (*Washb. Real Property*, vol. 1, p. 63).

" He cannot be divested of his estate in the land by
" the State, until after a formal proceeding on infor-
" mation filed for that purpose; and until this is done
" he may take, hold, sell, and convey—and some courts
" even go so far as to hold that he may devise—the

> " land he has possession of and pass a good title
> " thereto.' *Kerr on Real Property*, vol. 1, p. 215.

So, also, in the case of a corporation which by its charter or by statute is prohibited from acquiring or holding a certain quantity or value thereof, the courts have always held that such corporation could vest in its grantee a perfect title to the land which it was prohibited from holding.

In *National Bank vs. Matthews*, 98 U. S., 621, this court said (p. 628):

> " Where a corporation is incompetent by its charter
> " to take a title to real estate, a conveyance to it is
> " not void, but only voidable, and the sovereign alone
> " can object. It is valid until assailed in a direct
> " proceeding instituted for that purpose. *Leazure v.*
> " *Hillegas*, 7 Serg. & R. (Pa.), 313; *Goundie v. North-*
> " *ampton Water Co.*, 7 Pa. St., 233; *Runyon v. Coster*,
> " 14 Pet.. 122; *The Banks v. Poitiaux*, 3 Rand (Va.),
> " 136; *McIndoe v. The City of St. Louis*, 10 Mo., 577.
> " See also *Gold Mining Company v. National Bank*, 96
> " U. S., 640."

And in *Jones vs. Habersham*, 107 U. S., 174, Mr. Justice Gray, speaking for the court, said (p. 188):

> " Restrictions imposed by the charter of a corpora-
> " tion upon the amount of property that it may hold
> " cannot be taken advantage of collaterally by pri-
> " vate persons, but only in a direct proceeding by the
> " State which created it. *Runyan v. Coster*, 14 Pet.,
> " 122. 131; *Smith v. Sheeley*, 12 Wall., 358, 361; *Bo-*
> " *gardus v. Trinity Church*, 4 Sandf. (N. Y.) Ch., 633,
> " 758; *De Camp v. Dobbins*, 29 N. J. Eq., 36; *Davis v.*
> " *Old Colony Railroad Company*, 131 Mass., 258, 273.'

And again in *Reynolds vs. Crawfordsville Bank*, 112 U. S., 405, 413, the court said:

> " Where a corporation is incompetent by its charter
> " to take a title to real estate, a conveyance to it is not

> "void, but only voidable; the sovereign alone can "object. It is valid until assailed in a direct pro- "ceeding instituted for that purpose."

Applying this established rule to the case at bar, it follows that even if the locator of the Yes You Do claim comes within the inhibition of section 453, Rev. Stats., which we earnestly deny, his conveyance to the plaintiff in error vested in him a perfect title and one not open to attack from any source.

From the testimony of Smith (Rec., 71) it appears that at the time he conveyed the Yes You Do claim to Lavagnino there was an agreement between them that if and when Lavagnino obtained patent to the claim he was to pay Smith a further sum of $600, less any amount expended in securing patent or in litigation incident thereto. After alluding to this evidence the supreme court of Utah, in its opinion, adds (Rec., 144):

> "Before making the adverse claim and bringing "this suit Lavagnino knew that Smith was a deputy "U. S. mineral surveyor, for Smith, as such, made "the survey and plat filed in the land office with the "adverse claim, so that, if section 452 includes deputy "mineral surveyors, Lavagnino, before expending any "sum except one dollar, was at that time advised of "the fact, if he was not before, that his agreement "with Smith was in violation of the provisions of said "section, and that the conveyance of the 'Yes You "Do' for that reason was invalid."

In so holding, we submit, the court below plainly erred. The fact that Smith, in the event that Lavagnino obtained patent to the Yes You Do claim, might receive some additional compensation for his conveyance, in nowise alters the legal effect of the deed. The deed conveyed all Smith's title in the claim to Lavagnino. No title, legal or equitable, remained in Smith after the conveyance. If, under the agreement referred to, any further sum should become due on

the purchase price, Smith would have no lien on the lode claim therefor. Such further sum could only be recovered in *assumpsit* against Lavagnino, inasmuch as the laws of Utah do not provide for a vendor's lien.

The fact that Lavagnino knew that Smith was a deputy mineral surveyor can have no possible bearing on the validity of the conveyance. As we have shown above, even if Smith came within the prohibition of section 452, Rev. Stats., he could nevertheless convey a perfect title to a qualified grantee. The fact that Smith might receive some possible further sum on account of his conveyance of the claim could not possibly, under section 452, Rev. Stats., affect Lavagnino's title under the deed, which was without condition and created no trust interest in Smith's favor.

The only possible effect of the statute, if it applies, would be to render Smith liable to removal from his position as deputy mineral surveyor. Hence in excluding the deed from Smith to Lavagnino there was manifest error.

III.

EVERY RULING BELOW NOW CLAIMED AS ERROR WAS DISTINCTLY BASED ON THE COURT'S CONSTRUCTION OF SECTION 452, REV. STATS., AS DENYING OR PROHIBITING THE RIGHTS CLAIMED BY PLAINTIFF UNDER SECTION 2319, REV. STATS., AND OTHER PROVISIONS OF THE MINING LAWS.

In rejecting the offered proof of the location of the Yes You Do claim and of the conveyance thereof from Smith to Lavagnino the trial court in express terms based its ruling on section 452, Rev. Stats., which it was held limited the grant of section 2319 to the exclusion of the rights claimed by plaintiff thereunder, the court saying (Rec., 74):

> "The court in the construction of these two sections
> "holds that section 452 qualifies the section 2319, to
> "the extent that—as construed by the court—it would

"be prohibited as a matter of public policy, that is, "the right of J. Fewson Smith to make this loca- "tion."

In rejecting the offered proof of the filing of protest and adverse claim in the United States Land Office, the trial court said (Rec., 76):

"As to the proceedings in the Land Office, in so "far as the claim of the plaintiff to the Yes You Do "is concerned, the court having held that the loca- "tion was void, having held that the locator, J. Few- "son Smith, was not authorized, but prohibited by "the law from making the location, and that the filing "of the adverse claim by him in the Land Office "would be invalid, the objection to that offer will be "sustained."

In rejecting the offered proof of the Levi P. location and claim, the trial court said (Rec., 130):

"No adverse claim has been filed, though through "the peculiar conditions which have arisen in the "trial of this case, the plaintiff, who claims to be the "owner of the Yes You Do claim, also claims that he "did file an adverse claim to this application for "patent, but on account of the invalidity of the loca- "tion notice of the Yes You Do and the reason that "the locator of the claim was disqualified, being a "deputy United States mineral surveyor, and couldn't "initiate any title by anything he might do with ref- "erence to making a location of the Yes You Do, the "location notice has been rejected as evidence. Now, "that being so, the application for a patent being un- "challenged, the assumption of the law is that the "applicants are entitled to patent their claims as ap- "plied for, and third parties will not be permitted to "question the validity of the proceedings to obtain "patent, or make any objections, except to show that "the applicants for a patent have not complied with "the law. The Eureka case, decided in 4th Saw- "yer—I don't remember the name of it—held that "when a party made an application for a patent, any

"adverse claimant failing to file his adverse claim
"within the sixty days' period of publication, in which
"he asserted or, rather, defined the nature and bound-
"aries and extent of his adverse claim, that he
"would be held to waive it. And as no adverse
"claimants are before the court to any part or any
"portion of the land embraced within the Uhlig
"No. 1 and the Uhlig No. 2 claims as surveyed and
"applied for, I don't think the location notice of any
"adjoining or conflicting claim could be heard to
"determine the right of the applicants to a patent in
"this case. And looking at the law in this way, I
"will rule out the location notice of the Levi P."

In rejecting the offered proof of the location of the Veta Lode claim, the trial court said (Rec., 134):

"In the position which the court has taken in the
"admission and rejection of testimony and the con-
"struction of the law, the facts might be as you con-
"tend, but still having failed to put in your adverse
"claim within the prescribed period, and defining
"the extent and boundaries of your claim, so far as
"these two locations are concerned, the Veta and the
"Levi P., whatever right the parties may have was
"waived by failure to properly adverse the applica-
"tion for patent by the defendant."

It is clear, therefore, (1) that the trial court excluded the evidence of the location of the Yes You Do claim, and of plaintiff's ownership thereof, because it held that the claimed location and possession thereof was in violation of section 452, U. S. Rev. Stats.; (2) that the proof of filing adverse was excluded because the location asserted as basis therefor was held to be void under section 452, U. S. Rev. Stats., and hence, under the ruling of the court, no valid adverse claim could be based thereon, and (3) that the offered proof of the Levi P. and Veta locations was excluded, because, no valid adverse claim under the court's previous ruling having been filed, the presumption under section 2325,

U. S. Rev. Stats., was conclusive that the defendants were entitled to possession. The necessary consequence of these rulings and this construction of the statute was a finding by the trial court that the defendants had been in exclusive possession of the area in conflict with the Uhlig No. 1 and 2 locations since 1889, and judgment was accordingly entered confirming their possessory title (Rec., 37, 40).

Examination of the opinion of the State supreme court shows that its decision was also predicated entirely upon its erroneous construction of section 452, U. S. Rev. Stats. The learned chief justice after quoting section 452, R. S., says (Rec., 144):

> "We think that the section in question includes "mineral surveyors and prohibits them, as held by the "Land Department, from entering any of the public "lands, while they are such deputies, and also from "directly or indirectly, acquiring any interest in the "purchase from the Government of the same. It fol- "lows that as J. Fewson Smith, Jr., while he was a "deputy mineral surveyor, was prohibited by said "section from entering a mining claim or directly or "indirectly acquiring any right or interest in the "purchase from the Government of such a claim, he "was also prohibited at that time from doing any of "the acts, upon the performance of which, under the "provisions of the mining law of 1872, the right of "making an entry, or purchase from the Govern- "ment, depends, and that his location of the 'Yes "You Do' was therefore void, and Lavagnino ac- "quired no rights under the deed to him of the same.
>
> "*The failure of the plaintiff to show, in chief, any "right to the premises in controversy disclosed the fact "that he was 'a stranger to the title' of the premises in "dispute, and that a nonsuit could, on motion, have "been properly granted.* So that a failure to establish "the defendant's claim could in no way benefit him "or validate his alleged title to the 'Yes You Do.' "Therefore the plaintiff had no more interest in, or "right to further contest the defendant's claim, on "the ground that the 'Levi P.' and 'Veta' were

> " valid and subsisting claims, than the said Andrew
> " P. Mayberry himself, or any other stranger had."

The court then quotes section 2325, U. S. Rev. Stats., to the effect that if no adverse claim be filed within the period of publication, " it shall be assumed that the applicant shall be entitled to a patent," and cites numerous cases to the same effect, adding (Rec., 147):

> " We think it is clear, both from the language of
> " the sections of the Revised Statutes referred to and
> " the authorities cited that it must, as stated by Mr.
> " Justice Brewer, be conclusively presumed that An-
> " drew P. Mayberry, as he failed to make any adverse
> " claim, had none, *and as the plaintiff failed to show any*
> " *right to the disputed premises, he became a stranger to*
> " *the title, and thereafter had no more right than any*
> " *other stranger to further contest the defendant's claim.*"

Then quoting from the finding of the trial court that the defendants have been in possession of the premises in controversy since January 1, 1889, the court cites and applies the State statute of limitations, concluding (Rec., 149):

> " The plaintiff, even if J. Fewson Smith, Jr., had
> " not been a deputy U. S. mineral surveyor, as the
> " location of the ' Yes You Do ' was not made until
> " eight years after the said possession of the Uhlig
> " Nos. 1 and 2 was begun, could not avail himself of
> " any rights which the said Mayberry may have had."

The court's reasoning follows the same lines as that of the court below. From the erroneous premise that the Yes You Do location was in violation of section 452, Rev. Stats., the court deduces the following propositions: (1) That plaintiff's protest and adverse claim based on the Yes You Do location was invalid and goes for naught; (2) that plaintiff, having filed no valid adverse, had no standing in court as adverse claimant—" was a stranger to the title;" (3) that plaintiff, not having the *status* of an adverse claimant under sec-

tion 2326, Rev. Stats., had no right to set up the prior Levi P. and Veta locations in rebuttal of defendants' claim that the ground was unappropriated at date of the Uhlig locations; (4) that no valid adverse claim having been asserted during the period of publication on the Uhlig Nos. 1 and 2, the presumption, under section 2325, U. S. Rev. Stats., was conclusive that defendants were entitled to the possession; and, further, (5) there being before the court no proof of any possession of the premises adverse to defendants, and there being a *prima facie* showing of their possession and working for a period exceeding the State statute of limitations, the presumption of defendants' title was also conclusive under section 2332, U. S. Rev. Stats.

Assuming the correctness of the premises, the propositions deduced therefrom are unassailable, but if section 452, U. S. Rev. Stats., does not prohibit location by a deputy mineral surveyor the whole structure falls, and every conclusion reached by the court is erroneous.

With due deference to the learned court, the statement that "the plaintiff, even if J. Fewson Smith, Jr., had not "been a deputy U. S. mineral surveyor as the location of the "'Yes You Do' was not made until eight years after the said "possession of the Uhlig Nos. 1 and 2 was begun, could not "avail himself of any rights which Mayberry may have had," is manifestly incorrect.

It is fundamental that, in order to acquire prescriptive title by adverse possession, such possession must be exclusive.

> "Adverse possession may best be defined as an actual, visible, and *exclusive* appropriation of land, commenced and continued under a claim of right—either openly avowed or constructive, as arising from the acts and circumstances attending the appropriation—to hold the land against him who was seized."
>
> *Buswell on Limitations and Adverse Possession*, sec. 237, p. 324.

> "It must be, in the language of the authorities, an actual, continued, adverse and *exclusive* possession for the space of time required by the statute."
> *Doswell vs. De la Lanza*, 20 How., 29, 32.

> "It is well-settled law that the possession, in order that it may bar the recovery, must be continuous and uninterrupted, as well as open, notorious, actual, *exclusive*, and adverse."
> *Armstrong vs. Morrill*, 14 Wall., 120, 145.

In *Ward vs. Cochran*, 150 U. S., 597, 609, this court reversed the court below for error in instructing the jury, because—

> "The jury were not told that, to make out the defense, the possession, in addition to certain other features properly specified, must be shown to have been actual and *exclusive*."

In *Larwell vs. Stevens*, 12 Fed. Rep., 559, the court, in charging the jury, said (p. 560):

> "As already stated, the possession, in order to avail the defendant, must be an exclusive possession; that is, he must not have held it within 10 years prior to the commencement of the suit in conjunction with one who was the real owner of it. If the real owner and the claimant of the possession, within 10 years prior to the bringing of the suit, had joint possession of the premises sued for, such a possession will not avail this defendant. The possession follows the title, and, if the owner and others are in possession, the law considers the owner to have the possession."

And in *Bracken vs. Union Pacific Railway Co.*, 5 C. C. A., 548; 56 Fed. Rep., 447, the court said (p. 450):

> "It is assigned for error that the court permitted the plaintiff to show that there was a traveled road across the land, and that there was nothing to prevent stock from straying upon it, and that persons other than the defendant cut hay upon the land. We see

no objection to this testimony. The question at issue was the duration, nature, and quality of the defendant's possession of the land. The character of the possession could only be determined by showing the condition of the land and the use made of it. The defendant claimed and exercised this right, and he could not object to the plaintiff's introducing in rebuttal any evidence having a tendency to show that his possession was not actual and exclusive. Any evidence tending to throw light on the nature, extent and character of the defendant's possession was relevant."

And the same rule has been repeatedly laid down by the supreme court of Utah.

In *Larsen vs. Onesite*, 20 Utah, 432; 59 Pac. Rep., 234, 235, the court said:

> "Where a party relies upon his title as obtained by prescription, he must allege the facts showing the existence of the right, or plead the prescriptive right, averring that the existence of the right was under a claim of right, was peaceable, without interruption, and open, notorious and *exclusive*."

And in *Coleman vs. Hines*, 24 Utah, 360; 67 Pac. Rep., 1122, an action in ejectment by a plaintiff claiming title by adverse possession, the court held that plaintiff had failed to establish her prescriptive title, since "the possession was not continuous, adverse, uninterrupted, or *exclusive*, for a period of seven years." The court then quotes with approval the passage from *Larsen vs. Onesite, supra*.

And again in *Dignan vs. Nelson*, 26 Utah, 186; 72 Pac. Rep., 936, 937, the court said:

> "In order to constitute an effective adverse possession, *there must be an ouster of the real owner*, followed by an actual, notorious and continuous possession of the adverse claimant."

It is manifest, therefore, that if the proof of the possession of the premises in controversy from January 1, 1889, to December 31, 1897, under the Levi P. and Veta locations had been before the court, it would have been impossible for defendants to have established title thereto by prescription under the Uhlig No. 1 and No. 2 locations. An essential element to the prescriptive title would have been lacking, viz., *exclusive* possession for the statutory period.

Hence the State supreme court, in holding that defendants had title by prescription to the premises in dispute, necessarily based its decision primarily on its construction of section 452, U. S. Rev. Stats. Without such prior construction of the Federal statute the court could not have applied the State statute of limitations, and there would have been nothing whereon to rest the decision as to defendants' prescriptive title. The foundation stone of the whole argument is the interpretation placed on section 452, U. S. Rev. Stats.; the construction of that statute is all-controlling in the case. The contention of opposing counsel that the State supreme court decided this cause "on other than a Federal question" is hence without merit.

In excluding the proof of the Levi P. location the court not only denied the rights specifically claimed by plaintiff under the general grant of section 2319, Rev. Stats., but also denied to him a right distinctly asserted under section 2324, Rev. Stats., authorizing relocation of mining claims. The location of the Yes You Do claim was in express terms a *relocation* of the Levi P. (Rec., 136). The validity of the prior location is a constituent element of a relocation, and the fact and record of the original location constitutes part of the chain of title of the relocated claim. The discovery of the original locator is adopted by the relocator and made the basis of his claim. Proof of the discovery, location, possession, and abandonment or forfeiture of the original claim are hence necessary to establish title under a relocation, and to exclude that proof is to deny the right of relocation.

"A relocation impliedly admits the validity of the prior location. *There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property.*"

Lindley on Mines (2d ed.), sec. 404.

"It is not necessary that the locator should be the first discoverer of the vein, but it must be known to him and claimed by him in order to give validity to the location."

Jupiter Mining Co. vs. Bodie Consol. Mining Co., 7 Saw., 96, 108; 11 Fed. Rep., 666, 676.

The plaintiff in error has therefore specially claimed rights under these two sections of the Federal statutes—sections 2319 and 2324, U. S. Rev. Stats.—in the courts below, and these rights those courts have denied, distinctly basing such denial upon a Federal statute (sec. 452) construed to be in limitation thereof. The case falls squarely within the third clause of section 709, U. S. Rev. Stats., as a "right * * * claimed * * * under a statute of * * * the United States, and the decision is against the * * * right * * * specially set up or claimed," and is hence reviewable here.

IV.

The judgment below should be reversed.

Respectfully submitted.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

N. W. SONNEDECKER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE ST. JOE MINING COMPANY, DEFENDANTS IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Answering the contention advanced by counsel for defendants in error on page 18 of their brief, to the effect that the offered and excluded proof of the location of the Levi P. and Veta Lode claims by Andrew P. Mayberry, on January 1, 1889, is not material in this case, and the further contention on page 19 of the brief that, the lines of the Uhlig No. 1 and Uhlig No. 2 Lode claims being laid over the Levi P. claim, the area in conflict between said claims would have inured to the benefit of the Uhlig No. 1 and Uhlig No. 2 on abandonment or forfeiture of the Levi P., so as to preclude any rights attaching by reason of the Yes You Do location, we submit the following:

I.

The mere fact that a senior lode location is subject to forfeiture for failure to perform annual work does not give the area in conflict with an overlapping junior location to such junior location without some definite act of relocation.

In *Lindley on Mines* (2d ed.), vol. 1, p. 651, sec. 363, it is said:

> "If B [the senior locator] should ultimately abandon "the location, the conflict area would not fall to D [the "junior locator].
>
> "D [the junior locator] might subsequent to the "abandonment of the conflict area by B [the senior "locator] amend his location and include the over- "lapping surface, but, without some act on his part "manifesting an intention to make a new appropria- "tion or acquire a new right after the abandonment "or forfeiture became effectual, this area would not "by mere gravity become a part of the junior location, "except for the purpose of defining the extralateral "right."

In *Jordan vs. Duke*, 53 Pac., 197, the supreme court of Arizona said (p. 201):

> "There is no such thing as making a location of "ground not open to relocation by reason of being "already located, and then, because of failure on the "part of the owners to support that claim, either by "abandonment or forfeiture, have the location relate "back to the original act. In the location of mining "claims, there is no such thing as relation of acts, ex- "cept such amendments as may take place in support "of an original valid location."

In *Oscamp vs. Crystal River Mining Co.*, 7 C. C. A., 233; 58 Fed. Rep., 293, plaintiff, claiming, under a senior location, the Excelsior claim, brought suit to recover possession of a triangular parcel overlapped by a junior location claimed

by defendants. On trial it was admitted by plaintiff that he had done no assessment-work for the year 1884, but had resumed work in 1885.

On appeal the United States circuit court of appeals for the eighth circuit held that the failure of the owners of the senior location to perform the annual assessment work thereon did not divest the senior locators of title to the area in conflict and vest it in the junior location without some definite act of relocation, the court saying (p. 297):

> "We are unable to see that the defendant company "can acquire a paramount right thereto as against "the owner of the Excelsior claim, except by taking "the same action under existing laws that other per- "sons would be required to take if they desired to "appropriate it as abandoned property."

II.

The alleged discoveries of the Uhlig No. 1 and Uhlig No. 2 lodes being within the prior, subsisting Veta location, the locations based thereon are void.

> "A location based upon a discovery made within "the limits of another existing and valid location is "void."
>
> Lindley on Mines (2d ed., vol. 1, p. 611, sec. 337).

In *Watson vs. Mayberry*, 15 Utah, 265; 49 Pac. Rep., 479, the supreme court of Utah said (p. 482):

> "The location of a mining claim is absolutely void "when its discovery point is within another valid "claim."

And in *Reynolds vs. Pasco*, 24 Utah, 219; 66 Pac. Rep., 1064, the same court said (p. 1065):

> "As said in 1 Lindley Mines, sec. 337, a location "based upon a discovery made within the limits of "another existing and valid location is void."

The same passage from Mr. Lindley's book is quoted and applied by the supreme court of Colorado in *Tuolumne Consolidated Mining Co. vs. Maier*, 134 Cal., 583; 66 Pac. Rep., 863, 864.

In *Erwin vs. Perego*, 35 C. C. A., 482; 93 Fed. Rep., 608, the circuit court of appeals, eighth circuit, in passing upon the respective rights of the litigants to mining ground in Utah thus stated the question presented (p. 611):

> "If the location which Perego made in 1889 be-
> "came valid at any time before October 5, 1895, when
> "the appellant made his discovery, that discovery
> "was not made upon unappropriated public land, and
> "was void."

The same rule was applied in *Crown Point Mining Co. vs. Buck*, 38 C. C. A., 278; 97 Fed. Rep., 462, 465.

This rule has also been uniformly applied by the Land Department.

In *Branagan vs. Dulaney*, 2 L. D., 744, it was held that:

> "A location based upon a discovery made within
> "the limits of another existing and valid location is
> "illegal."

Secretary Teller saying (p. 748):

> "If the locator has the exclusive right of the pos-
> "session and enjoyment how can a prospector go on
> "such claim and make a valid discovery? He can-
> "not become the owner of that portion of the vein or
> "lode discovered within a valid location, because that
> "has been given to the first locator. He has not dis-
> "covered mineral on land belonging to the United
> "States, for while the fee to a valid location may re-
> "main in the United States the exclusive right of oc-
> "cupancy and enjoyment has been given to the loca-
> "tor, and the lands described in such location made in
> "accordance with law, usage and customs, and main-
> "tained by compliance with the laws as to labor
> "thereon, may be considered as certainly segregated
> "from the body of public land, as if a patent had
> "issued therefor."

And in *Winter Lode*, 22 L. D., 362, the Department said (p. 364):

> "The statute itself and all decisions of the Depart-
> "ment and the courts make the discovery of mineral
> "a prerequisite to the location of a mining claim, and
> "the discovery must be upon land open to explora-
> "tion, not claimed or located by any other person."

Lindley on Mines (2d ed.), vol. 1, p. 613, sec. 338:

> "As the discovered lode must lie within the limits
> "of the location which is made by reason of it, if the
> "title to the discovery fails, so must the location
> "which rests upon it."

In *Gwillim vs. Donellan*, 115 U. S., 45, this court said (p. 50):

> "If the title to the discovery fails so must the loca-
> "tion which rests upon it."

Girard vs. Carson, 22 Colo., 345; 44 Pac. Rep., 508:

> "In order that the locator of a mining claim may
> "obtain any right to mining property by virtue of
> "his location, the same must be made upon the un-
> "appropriated lands of the United States."

Respectfully submitted.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

N. W. SONNEDECKER,
Of Counsel.

In the Supreme Court of the United States.

GIOVANNI LAVAGNINO,

Plaintiff in Error,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN AND THE ST. JOE MINING COMPANY,

Defendants in Error.

No. 120

MOTION TO DISMISS.

Now come the said defendants by Arthur Brown and D. H. Wenger, their attorneys, for the purposes of this motion, and move to dismiss the said cause for want of jurisdiction in this court, for the following reasons, to-wit:

FIRST: The Supreme Court of the State of Utah decided said cause on other than a federal question, and no federal question was raised in its decision.

SECOND: The decision of a federal question was not necessary to the final determination and decree of the Supreme Court of Utah.

THIRD: That no federal question is raised by the assignments of error, and no federal question is involved in this case. The foregoing motion will be submitted to the court on the first Monday in December, 1904.

D. H. WENGER,
ARTHUR BROWN,
Attorneys for Defendants.

STATE OF UTAH,
COUNTY OF SALT LAKE. } ss.

D. H. Wenger, being duly sworn, deposes and says: I served the foregoing notice of motion to dismiss the said cause for lack of jurisdiction, upon E. M. Allison, one of the attorneys for plaintiff in error, on this 31st day of October, 1904.

D. H. WENGER.

Subscribed and sworn to before me this 31st day of October, 1904.

[SEAL.] FREDERICK C. LOOFBOUROW,
Notary Public in and for Salt Lake County, Utah.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

GIOVANNI LAVAGNINO,
Plaintiff in Error,
vs.
EDMUND H. UHLIG, ALEXANDER McKERNAN AND SAINT JOE MINING COMPANY, A CORPORATION,
Defendants in Error.

No. 120

BRIEF OF DEFENDANTS IN ERROR ON MOTION TO DISMISS APPEAL.

The defendants in error respectfully contend, that this court has no jurisdiction in this case for the following reasons:

1st. That the decision of the Supreme Court of the State of Utah decided said cause on other than a federal question. (Tr. 147, 148, 149.)

2nd. That under the decision of the Supreme Court of the State of Utah, this court has no jurisdiction to hear and determine the question raised under Sec. 452, Rev. Stat. U. S., for the reason that the plaintiff in error has not brought himself within the provisions of Sec. 709, Rev. Stat. U. S. (Tr. 142, 143, 152, 153.)

The defendants in error, for the purpose of submitting the motion to dismiss the appeal, will submit such

parts of the record as are necessary for the purpose of determining this motion. The pleadings are drawn in the ordinary form of adverse proceedings in mining litigation, to determine the rights of possession to mining claims.

The suit was brought by the plaintiff in error, Giovanni Lavagnino vs. Edmund H. Uhlig, Alexander McKernan and the St. Joe Mining Company, adversing the application for a patent of the Uhlig No. 1 and the Uhlig No. 2, made by the defendants in error, with the alleged Yes You Do, by the plaintiff in error, in the Third Judicial District Court of the State of Utah. There is nothing in the pleadings indicating a federal question.

In the trial of said cause in the District Court, the court found the issues for the defendants, and filed the following findings of fact:

FINDINGS OF FACT.

"1. That the plaintiff herein has failed and neglected to prosecute his action against the above named defendant, Alex. McKernan, and that prior to the trial of this cause the said action of plaintiff as to the defendant Alex. McKernan was by the court dismissed.

2. That after the commencement of this action, and before the trial of the same the defendant, Edmund H. Uhlig, assigned, transferred and conveyed to the Saint Joe Mining Company, a corporation, under the laws of Utah, all his right, title and interest in and to the premises in the complaint and answer herein described as the 'Uhlig No. 1' and 'Uhlig No. 2' Lode mining claims, and by an order duly entered in this cause the said Saint Joe Mining Company was and is substituted in lieu of the said Edmund H. Uhlig as defendant herein.

3. That the plaintiff herein introduced upon the trial of this cause no legal or competent evidence to sustain the allegations of the complaint or to sustain the issues upon the part of plaintiff, and

upon the trial, on motion of counsel for defendants, the said action of the plaintiff against the defendant was and is hereby dismissed.

4. That on or about the first day of January, 1889, one Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain Mining District, Salt Lake County, State of Utah, and having discovered thereon a lode of mineral-bearing rock in place bearing lead, iron, silver and other minerals, did then and there locate the same as the 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims, by marking the boundaries thereof upon the ground by suitable monuments, so that the boundaries thereof could be readily traced, and by posting at the points of discovery upon said mining claims respectively notices of location, describing the same by reference to natural objects and permanent monuments; that thereafter he caused copies of said notices of location, respectively, to be duly filed and recorded in the office of the district recorder of said West Mountain Mining District.

5. That thereafter the said Edmund H. Uhlig and the defendant, the Saint Joe Mining Company, remained in possession of said mining claims, working and developing the same and causing to be done thereon and for the benefit of said claims in each and every year up to and including the year 1900 the annual assessment work required by the laws of the United States.

6. That thereafter by divers deeds properly executed and of record in the office of the county recorder of Salt Lake County, Utah, the said Edmund H. Uhlig conveyed all of said 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims to the defendant, the Saint Joe Mining Company, and to Alexander McKernan, and that prior to the commencement of this action, to-wit, on the 24th

day of August, 1898, the said Edmund H. Uhlig, the predecessor in interest of the Saint Joe Mining Company, and the said Alex McKernan, in due form, made application for United States patent for the said 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims in the United States land office at Salt Lake City, Utah, against which said application the plaintiff herein filed his adverse claim, and afterwards brought this action against the said defendants for the purpose of determining the title and right of possession of the premises set forth and described in the complaint herein as the area in conflict between the 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims, and the alleged 'Yes You Do' mining claim."

Paragraph seven sets forth the full and complete description of the "Uhlig No. 1" and "Uhlig No. 2" lode mining claims. (Tr. 37, 38.)

From the foregoing findings of fact the court found its

CONCLUSIONS OF LAW.

That the action against the defendants should be dismissed.

That the defendants are the owners of and in possession of the premises and entitled to a decree quieting title in favor of the defendants.

DECREE.

Decree in favor of defendants in accordance with the finding of fact and conclusions of law.

From a decree in favor of the defendants, plaintiffs appealed to the Supreme Court of the State of Utah, assigning as error that the District Court erred in sustaining the objection to the admission in evidence of the location of the Yes You Do mining claim and the deed to Lavagnino offered in connection therewith.

The following is the statement of facts, as set out by the Supreme Court of the State of Utah:

"The defendants, Edmund H. Uhlig and Alex. McKernan, on or about the 24th day of August, 1898, made an application in the United States land office at Salt Lake City, for a patent for the Uhlig No. 1 and Uhlig No. 2 mining claims. The plaintiff, in due time, filed in said land office an adverse claim to a portion of the said Uhlig Nos. 1 and 2, which overlapped and included a part of the 'Yes You Do' mining claims. Thereupon further proceedings on said application were stayed in the land office, and the plaintiff in due time instituted this action to determine, as provided in Section 2326 of the Revised Statutes of the United States the right to the possession of the portion of the Uhlig Nos. 1 and 2 which conflicts with the Yes You Do.

It appears from the record that the summons in respect to the defendant, Alex. McKernan, was quashed, and the action as to him was discontinued; that pending the action, which was not dismissed as to the co-defendant, Edmund H. Uhlig, and before the trial, he conveyed his interest in the Uhlig Nos. 1 and 2 to the Saint Joe Mining Company, a corporation, organized under the laws of the State of Utah, and said company was substituted as defendant in place of the said Edmund H. Uhlig. The trial court adjudged and decreed that the St. Joe Mining Company and the said Alex. McKernan are the owners in possession, and entitled to the possession, except as against the paramount title of the United States, of the premises in dispute (which was described in the decree by metes and bounds) and that the defendant recover its costs, etc. From this decree the plaintiff has taken an appeal.

It appears from the testimony of J. Fewson Smith, Jr., a witness for the plaintiff, that he located the 'Yes You Do' on the 1st of January, 1898; that at that time and at the time of the trial he

was a deputy United States mineral surveyor, 'attached to the office of the surveyor general of the district of Utah;' that he had an interest in the litigation; that between the time of making said location and the time of filing the protest in the land office by the plaintiff he agreed with plaintiff to convey to him the 'Yes You Do' mining claim for the consideration of one dollar, and the sum of six hundred dollars, the future payment of which depended upon the conditional stipulations, the substance of which is as follows: If a patent for said claim should be obtained without litigation Lavagnino, the plaintiff, was to pay $600, but if there was litigation through any source, in respect to said claim, and a failure to procure patent for the same, then no part of the $600 was to be paid for the conveyance. In case there was such litigation then the said Smith was only to be paid said sum less the expense of patenting the claim, if one should be obtained, but if a patent was only obtained for a small triangle, or part of the claim, the plaintiff might refuse to pay the remainder of the consideration. In pursuance of the foregoing agreement the claim was deeded to the said plaintiff by Smith, but the only consideration named therein was the sum of one dollar.

The said Smith also testified that 'when he transferred the ground to Lavagnino it was for the purpose of defeating these other claims and not with a view of making much;' and having further testified that he made the plat showing the conflict in question in this case, he was asked, on cross-examination, the following question: Isn't it a fact that you being a deputy United States mineral surveyor couldn't make the survey and protest for your claim if you held it in your own name, and you consequently turned it over to Mr. Lavagnino?"

A.—"It is a fact that I couldn't make the protest in

my own name while I held an interest in the claim."

After the disclosure of the foregoing facts the plaintiff offered in evidence a certified copy of the location notice of the 'Yes You Do' and in connection therewith the deed to Lavagnino. To this offer the defendant objected upon the grounds, which in substance, were as follows: That by the testimony of the witness, J. Fewson Smith, Jr., it appears that said mining claim was not located by a person who had the power, under the Act of Congress, to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned, January 1st, 1898, a deputy United States mineral surveyor for Utah, and therefore, incompetent to make locations; that in this particular action it now appears that the witness, at the time he made the protest map, plat and survey, fixing the boundaries for the purpose of an adverse claim and protest introduced in the land office, was himself a deputy United States mineral surveyor, interested in the action, as he himself has stated, therefore the location itself was in violation of the law, and could not be the basis either of a valid location in himself or a deed to anybody.

The trial court excluded the said notice and deed on the ground that 'J. Fewson Smith, Jr., the locator of the claim was prohibited from making the location of a lode mining claim, and therefore had not the qualifications to initiate any title by any act that he did with reference to locating the 'Yes You Do' mining claim. The plaintiff after duly excepting to the ruling of the court rested. The defendant then proceeded to introduce evidence in support of the validity of the Uhlig Nos. 1 and 2 mining claims, after which, in rebuttal, the plaintiff offered to show that the 'Levi P.' and 'Veta' mining claims, at

the time of the location of the Uhlig Nos. 1 and 2, were valid and subsisting claims and covered the discoveries of both the Uhlig Nos. 1 and 2, and were then owned by Andrew P. Mayberry.

The trial court sustained the objection on the ground that as no adverse claim, based upon the 'Levi P.' and 'Veta' claims had been made within the prescribed period, whatever rights the parties may have had to said claims were waived by failure to properly adverse the application for a patent by the defendant.

It does not appear from the record that any adverse claim, whatever, based upon the 'Levi P.' and 'Veta' was made in the land office, in the matter of the defendant's application for a patent of the Uhlig Nos. 1 and 2; nor does the plaintiff claim any interest in said mining claims." (Tr. 140, 141, 142, 143.)

After stating the facts, Baskin, C. J., delivered the opinion of the court:

"The refusal to permit the certified copy of the location notice of the 'Yes You Do' and the deed offered in connection therewith to be introduced in evidence, and the rejection of the evidence relating to the Levi P and Veta mining claims is assigned as error.

Section 452 U. S. Rev. Stat. provides: 'The officers, clerks and employees of the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands; and any person who violates this section shall forthwith be removed from his office.'

"Subsequent to the enactment of this section, Sec. 2319 of the U. S. Rev. Stat. was passed, and is as fololws: 'All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase and the

lands in which they are found, to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are not inconsistent with the laws of the United States.'

The former section has been retained in all of the revisions of said statutes made since its enactment.

These sections are, therefore, in *pari materia* and must be construed together, and if possible, made to harmonize and not to violate the general public policy, which, it is evident, the former was enacted to prevent. Before making the adverse claim and bringing this suit, Lavagnino knew that Smith was a U. S. mineral surveyor, and for him, as such, made the survey and plat filed in the land office with the adverse claim, so that, if Section 452 includes deputy mineral surveyors, Lavagnino, before expending any sum, except one dollar, was at the time advised of the fact, if he was not before; that his agreement with Smith was in violation with the provisions of said section, and that the conveyance of the 'Yes You Do' for that reason was invalid.

We think that the section in question includes mineral surveyors and prohibits them as held by the land department from entering any of the public lands while they are such deputies, also from directly or indirectly acquiring any interest in the purchase from the government of the same. It follows, that if J. Fewson Smith, Jr., while he was a deputy mineral surveyor, was prohibited by said sections from entering a mining claim, and directly or indirectly acquiring any right or interest in the purchase from the government of such a claim, he was also prohibited at that time from doing of the acts upon the performance of which, under the provisions of the min-

ing law of 1872, the right of making and entering or purchasing from the government depends, and that his location of the 'Yes You Do' was therefore void, and Lavagnino acquired no right under the deed to him of the same.

The objection to the admission in evidence of the certified copy of the notice of location of the 'Yes You Do' and the deed to Lavagnino in connection therewith, and the objection to the evidence relating to the Levi P. and Veta mining claims were properly sustained."

As will be seen by said decision of the Supreme Court of the State of Utah, said Sections 452 and 2319 of the Revised Statutes of the United States would read, if put together, as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the land in which they are found, to occupation and purchase by citizens of the United States and those who become such;" provided that, however, "the officers, clerks and employees of the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands;" and that said prohibition includes deputy United States mineral surveyors.

The Supreme Court of the State of Utah, however, held it was immaterial whether J. Fewson Smith. Jr., was a deputy United States mineral surveyor and decided the case on other grounds as will be seen by reference to the decision of the Supreme Court of the State of Utah, where the court holds as follows:

"The trial court found that 'on or about the first day of January, 1889, one Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain Mining District, Salt Lake County, State of Utah, and having discovered thereon a lode of

mineral-bearing rock in place, bearing lead, iron, silver and other minerals, did then and there locate the same as the 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims, by marking the boundaries thereof upon the ground by suitable monuments, so that the boundaries thereof could be readily traced, and by posting at the points of discovery upon said mining claims respectively notices of location, describing the same by reference to natural objects and permanent monuments, that thereafter he caused copies of said location notices, respectively, to be filed and recorded in the office of the district recorder of said West Mountain Mining District. That thereafter the said Edmund H. Uhlig and the defendant, the Saint Joe Mining Company, remained in possession of said mining claims, working and developing the same and causing to be done thereon and for the benefit of said claims in each and every year up to and including the year 1900 the annual assessment work required by the laws of the United States."

The application for a patent for the Uhlig No. 1 and 2 was made on August 24, 1898. The Yes You Do was located on the 1st of January, 1898, eight years after the location of the Uhlig No. 1 and 2.

Sec. 2332 Rev. Stat. provides that "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitation for mining claims of the state and territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property attached prior to the issuance of a patent."

Sec. 2997, Subd. 2, Comp. Laws, Utah, 1888, provides that the words 'real property as used in the code of civil procedure, unless otherwise apparent from the context, are co-extensive with lands, tenements and hereditaments, water-rights, and possessory rights and claims."

The territorial Supreme Court in Houtz v. Gisborn, 1 Utah, 173-176, held that under said section, mining claims are real property and pass by deed.

There are numerous authorities which hold (without regard to statutory provisions) that mining claims are real estate. (Citing authorities.)

Sec. 2332 is applicable to lode mining claims. (Citing authorities.)

Subd. 2, Sec. 2997, Comp. Laws, Utah, 1888, is still in the Revised Statutes of 1898, Subd. 10, Sec. 2498.

A mining claim being a possessory right, it is real estate under the provisions of the statutes of Utah, before referred to, and any claim which Mayberry might have had, as he failed to institute a suit to recover the same within seven years after the possession of the Uhlig No. 1 and 2, as found by the trial court, began, was barred by Sec. 2859 of Revised Statutes of Utah, which is as follows: "No action shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor was seized or possessed of the property in question within seven years before the commencement of the action." It was also waived by his failure to adverse the application for a patent of the Uhlig No. 1 and 2. *In view of these facts, the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy United States mineral surveyor, as the location of the Yes You Do was not made until eight years after the said possesison of the Uhlig Nos. 1 and*

2 was begun, could not avail himself of any rights which the said Mayberry may have had.

The decree of the court below is affirmed, with costs."

Upon said decision and judgment, plaintiff in error submits three alleged assignments of error as follows:

"1. The Supreme Court of the State of Utah erred in holding that the location of the Yes You Do lode mining claim by J. Fewson Smith, Jr., was invalid because said Smith at the time of the location was a deputy United States mineral surveyor.

2. Said court erred in holding that the court below did not err in sustaining the objection of the defendant to the introduction in evidence by the plaintiff of the notice of location of the Yes You Do lode mining claim by J. Fewson Smith, Jr., upon the ground that said location was invalid because J. Fewson Smith, Jr., at the time of the location was a deputy United States mineral surveyor.

3. Said court erred in holding that the court below did not err in sustaining the objection of the defendant to the introduction in evidence by the plaintiff of the deed from said J. Fewson Smith, Jr., to the plaintiff, Giovanni Lavagnino, for said lode mining claim upon the ground that the location of said mining claim by said J. Fewson Smith, Jr., was invalid because he at the time of the location was a deputy United States mineral surveyor and that therefore there was no valid location of said claim by said Smith."

We submit that had the trial court admitted the notice of location in evidence of the Yes You Do and had the notice been regular in form and had the plaintiff proved his alleged offers that the plaintiff had performed the annual labor and improvements required by law upon the Yes You Do mining claim; still the findings of fact would be the same as heretofore set out, for the reason that the Uhlig Nos. 1 and 2 being the prior loca-

tions and the defendants having complied with the law the result could not be other than as found by the court in favor of the defendants; so that we contend that the court rightfully held that it was immaterial whether the location of the Yes You Do mining claim was valid or not, as held by the Supreme Court of the State of Utah, and said decision by the Supreme Court of the State of Utah being based on other than a federal question, the appeal should be dismissed.

> "It often has occurred, however, and will occur again, that there are other points in the case than those of federal conizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case.
>
> But in the other cases supposed, why should a judgment be reversed for an error in deciding the federal question, if the same judgment must be rendered on the other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below, after they have corrected the error in the federal question?
>
> We have already laid down the rule that we are not authorized to examine these other questions for the purpose of deciding whether the state court ruled correctly on them or not. We are of opinion that on these subjects not embraced in the class of questions stated by the statute, we must receive the decision of the state courts as conclusive.
>
> But when we find that the state court has decided the federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the federal question

alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the state court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the federal question. In the latter case the court would not be justified in reversing the judgment of the state court.

But this examination into the points in the record other than the federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain if any such have been decided, and their sufficiency to maintain the final judgment, as decided by the state court.

Beyond this we are not at liberty to go, and we can only go this far to prevent the injustice of reversing a judgment which must in the end be reaffirmed, even in this court, if brought here again from the state court after it has corrected its error in the matter of the federal law." Murdock v. City of Memphis, 20 Wall. 590, 634.

"It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for discussion by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment as rendered could not have been given without deciding it. Murdock v. Memphis, 20 Wall. 590; Cook County v. Calumet & Chicago Canal Co., 138 U. S. 635.

It is likewise settled law that, where the record discloses that if a question had been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal, has

been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment.

In Klinger v. Missouri, 13 Wall. 257, 263, this court, through Mr. Justice Bradley, said: "The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.

In Johnson v. Risk, 137 U. S. 300, the record showed that the Supreme Court of Tennessee, two grounds of defense had been urged, one of which involved the construction of the provisions of the federal bankrupt act of March 2, 1867, and the other the bar of the statute of limitations of the state of Tennessee; and this court held that 'where in an action pending in a state court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court that the judgment was rested upon the disposition of the federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defense which does not involve a federal question is so palpably unfounded that it cannot be presumed to have been

entertained by the state court." Eustis vs. Bollis, 150 U. S. 361, 366.

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented." California Powder Works v. Davis, 151 U. S. 393.

In the case at bar it was necessary for the plaintiff in error to show by the facts that he had a prior location, that he had possession and had complied with the laws of the United States, the laws of Utah and the rules and regulations of the mining district, which was not done, before it could become material that he was denied a right under the federal statutes, as this court has held:

"But the difficulty in this case is, that, before it could be said that any right or title under a statute of the United Sttaes had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws and decisions. These were local and not federal questions. The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of a federal question. The writ of error must therefore be dismissed." Tel-

luride Power Co. v. Rio Grande &c. Ry., 175 U. S. 647.

Adverse proceedings under the mining laws of the United States are properly brought in the State courts and a writ of error does not lie to the Supreme Court of the United States simply because a party claims a right under such mining laws:

> "The legal import of this decision plainly is that a controversy between rival claimants under Sections 2325 and 2326 of the Revised Statutes, may be properly determined by a state court and that the judgment of a State Supreme Court in such a case, can not be reviewed by this court simply because the parties were claiming rights under the federal statute." Blackburn v. Portland Gold Mining Co., 175 U. S. 584.
>
> "It is quite evident that these findings involved either questions of fact or questions of local law, and that while the finding of the ultimate fact of prior possession may possibly have been a legal conclusion, it was not a federal question. In this particular the case is covered by Ehlers v. Boatman, 111 U. S. 356, which was an action for the settlement of adverse claims to mineral lands. The case turned upon the priority of the location, which the court held was a matter of fact, although the court below called it a conclusion of law." Telluride Power Co. v. Rio Grande &c. Ry., 175 U. S. 646.

If there is a federal question in this case, it arises from Sec. 452 Rev. Stat. U. S., which reads as follows:

> "The officers, clerks and employes in the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands; and any person who violates this section shall be removed from his office."

The defendants in error, however, contend that had the decision of the Supreme Court of Utah been based solely on the invalidity of the location of the Yes You Do by reason of the location having been made by J. Fewson Smith, Jr., while he was a deputy United States mineral surveyor, still this court would not have jurisdiction. This court can gain jurisdiction only through Section 709 Rev. Stat. U. S. This section is divided into three parts:

1. "Where is drawn in question the validity of a treaty or statute of, or any authority exercised under, the United States, and the decision is against the validity."

This part can not apply, as the decision was in favor of its validity.

2. "Where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity."

No state statute or authority was called in question, so that part two can not give the court jurisdiction.

3. "Where any title, right, privilege, or immunity is claimed, under the constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission or authority."

The only statute of the United States referred to in plaintiff's petition for a writ of error is said Section 452, above referred to, as will be seen by reference to plaintiff's petition (Tr. page 152, paragraph 7), as follows:

"That the Supreme Court of the State of Utah in deciding said cause and in affirming said judgment expressly held that under the laws of the

United States, Rev. St. U. S., Sec. 452 (U. S. Comp. St. 1901, page 257), said J. Fewson Smith,, Jr., at the time of making the location of the Yes You Do lode mining claim was prohibited from making said location because he was a deputy United States mineral surveyor."

The defendant in error specially set up and claimed as a bar to the claim of plaintiff in error said Section 452, and the decision of the Supreme Court of the State of Utah sustained the position of the defendant. By reference to said Section 452 it will be seen that it is a prohibitive statute, and was specially set up and claimed by defendants as a bar to plaintiff's claim, and as no right, title, privilege or immunity was asserted by plaintiff in error, he is not entitled to a review, the objection was raised by the defendant and the decision was in favor of the defendants, and therefore Section 709 Rev. St. U. S. does not give this court jurisdiction.

"There was undoubtedly a federal question raised in the case, but it was raised by the plaintiff, Nesbitt, who based his right to recover upon the Acts of Congress of November 3, 1893, and July 18, 1894, suspending the forfeiture of mining claims for failure to do the required amount of work. The decision of the court, however, was in favor of and not against, the right claimed under this statute, and of this construction the plaintiff in error is in no position to take advantage, as it made no claim under those statutes. This subject was considered in the case of Missouri v. Andriano, 138 U. S. 496, in which the contest was between rival claimants to the office of sheriff. Respondent relied upon the fact that he had received a majority of the votes cast at a popular election for the office. Relator claimed the election to be void under the state constitution, which declared that no one should be elected or appointed to office who was not a citizen of the United States. Respondent admitted his

foreign birth, but claimed that, under Rev. Stat. Sec. 2172, he became a citizen by the naturalization of his father. The decision was in his favor, and it was held that the relator had no right to a review of the question in this court, although if the judgment had been adverse to the claim of the respondent there would have been no doubt of his right to a writ of error. It was said that the right privilege must be personal to the plaintiff in error, and that he was not entitled to a review where the right or privilege was asserted by the other party, and the decision was in favor of their party, and adverse to himself. It is manifest that the object of Sec. 709 was not to give a right of review wherever the validity of an Act of Congress was drawn in question, but to prevent states from frittering away the authority of the federal government by limiting too closely the construction of the Federal Statutes. Hence the writ of error will only lie where the decision is adverse to the right claimed." De Lamar's Nevada Gold Mining Co. v. Nesbitt, 177 U. S. 524.

The defendants in error therefore contend:

1st. That as the Supreme Court of the State of Utah decided said cause on other than a federal question, and that therefore this court has no jurisdiction.

2nd. That the plaintiff in error has not brought himself within the provisions of Section 709, Revised Statutes of the United States, and therefore this court has no jurisdiction to hear the case and the appeal should therefore be dismissed.

Respectfully submitted,

ARTHUR BROWN, AND

D. H. WENGER,

Attorneys for Defendants in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

GIOVANNI LAVAGNINO,
Plaintiff in Error,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE SAINT JOE MINING COMPANY, A CORPORATION,
Defendants in Error.

No. 120

Brief of Defendants in Error.

STATEMENT.

The petition of plaintiff in error, for the purposes of this brief, we will admit, sets forth the proceedings as they occurred in the District Court and Supreme Court of the State of Utah.

We desire, however, to call the court's attention to some additional facts in connection with the trial of said cause in the Third Judicial District Court.

First—That J. Fewson Smith, Jr., on the 1st day of January, 1896, at the time of making the alleged location of the Yes You Do lode mining claim, was a deputy United States mineral surveyor for the district of Utah, it being the district wherein said mining claim was located; and

that said Smith was such deputy United States mineral surveyor at all times from said January 1st, 1898, to the time of trial. (Tr. 47-49.)

Second—That said Smith, as such deputy, made the survey for the adverse proceedings in the land office, while he was the owner of said Yes You Do mining claim. (Tr. 57, 63.)

Third—That said Smith, as such deputy, made the plats and maps for the adverse in the land office, and the maps and exhibits for the plaintiff and introduced in evidence by the plaintiff at the trial, and that said Smith had an interest in the said Yes You Do mining claim during all of said time. (Tr. 49-63-71-72.)

Fourth—That said Smith knew he could not bring the protest in his own name while he held an interest. (Tr. 67.)

Fifth—That the only consideration paid by the plaintiff, Lavagnino, up to the time of trial was the sum of one dollar. (Tr. 66.)

Sixth—That when said Smith transferred the land and ground to Lavagnino it was for the purpose of defeating these other claims, and not with a view of making much. That he had no love for the other locators or their possessors, and that his ambition was to knock them out. (Tr. 66, 69.)

Seventh—That the plaintiff, Lavagnino, knew that said Smith was a deputy U. S. mineral surveyor, for the said Smith, as such, made the survey and plats for the land office, and the maps for the District Court. (Tr. 69.)

With the foregoing facts in evidence before the District Court, the plaintiff offered in evidence a certified copy of the location notice of the Yes You Do, and the deed to Lavagnino in connection therewith, to which offer the defendants objected, upon the ground:

That the same is incompetent, irrelevant and immaterial, for the reason that by the testimony of the witness it appears that it was not located by a person who had the power under the act of Congress to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned, January 1, 1898, a deputy United

States mineral surveyor for Utah, and therefore incompetent to make locations.

That it appears from the testimony of the witnesses that the time when the protest map and plat were made and the survey made by the surveyor for the purpose of fixing the boundaries for the purpose of the adverse claim and protest, the witness, who made the survey and made the plat which was introduced in the land office, was himself a deputy United States mineral surveyor, interested in the action, as he himself stated, interested in the title of the claim.

That it appearing affirmatively that the location, when made, was made by a deputy mineral surveyor who was prohibited by law from making it, therefore the location itself was in violation of the law, and could not be the basis of anything to transfer, either the basis of a valid location in himself or any basis to deed to anybody. The court sustained the objection to the offer in evidence of the certified copy of the location notice and the deed in connection therewith, upon the ground that under the law, J. Fewson Smith, Jr., the locator of the claim, was prohibited from making the location of a lode mining claim; and therefore had not the qualifications to initiate any title by any act, that he did with reference to the locating of the Yes You Do mining claim. No exception was taken to the ruling of the court by the plaintiff. Thereupon the plaintiff rested. (Tr. 72, 73 and 74.)

The defendant then introduced evidence showing that on or about the 1st day of January, 1889, one, Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain Mining District, Salt Lake County, State of Utah, and having discovered thereon a lode of mineral bearing rock in place bearing lead, iron, silver and other minerals, did then and there locate the same as the Uhlig No. 1 and Uhlig No. 2 lode mining claims, by marking the boundaries thereof upon the ground with suitable monuments, so that the boundaries thereof could be readily traced, and by posting at the point of discovery on said mining claims respectively,

notice of location, describing the same by reference to natural objects and permanent monuments.

That thereafter he caused copies of said notices of location respectively to be duly filed and recorded in the office of the District Recorder of said West Mountain Mining District. That thereafter the said Edmund H. Uhlig, and the defendant, the Saint Joe Mining Company, remained in possession of said mining claim, and worked and developed the same, causing to be done thereon and for the benefit of said claims in each and every year and including the year 1900 the annual assessment work required by the laws of the United States, and expended upon said mining claims the sum of $1,200, in the year 1897, the year prior to the location of the said Yes You Do lode mining claim. That thereafter, judgment was entered in favor of the defendants and against the plaintiff, and findings of fact, conclusions of law and decree in favor of the defendants were filed and entered of record, in accordance with said facts, by the said Third Judicial District Court. (Tr. 37.)

That thereafter the said plaintiff, Lavagnino, took an appeal to the Supreme Court of the State of Utah, assigning as error the sustaining of the objection to the admission in evidence of the certified copy of the location notice of the Yes You Do and the deed to Lavagnino offered in connection therewith. The Supreme Court of the State of Utah, after stating the facts, held that under Section 452 of the Rev. Stat. of the U. S. said J. Fewson Smith, Jr., as such deputy United States mineral surveyor was prohibited from making mining locations, and that the objection to the admission in evidence of the certified copy of the notice of location of the Yes You Do and deed to Lavagnino, offered in connection therewith, were properly sustained. The Supreme Court of the State of Utah further held, that the defendants were in possession of said Uhlig No. 1 and Uhlig No. 2 for more than seven years, and were entitled to hold the same under the Statutes of Limitations; and further held:

"In view of these facts, the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy United

States mineral surveyor, as the location of the Yes You Do was not made until eight years after the said possession of the Uhlig No. 1 and Uhlig No. 2 was begun, could not avail himself of any rights which the said Mayberry may have had."

And affirmed the decree of the court below.

From said decision of the Supreme Court of the State of Utah, the plaintiff seeks to come to this court on a writ of error, assigning as error the sustaining of the objection to the admission in evidence of the certified copy of the notice of location of the Yes You Do and the deed to Lavagnino offered in connection therewith in the trial court, and the affirming of the same by the Supreme Court of the State of Utah.

ARGUMENT.

Section 452, U. S. Rev. Stat., provides: "The officers, clerks, and employees in the general land office are prohibited from, directly or indirectly, purchasing or becoming interested in the purchase of any of the public land. Any person who violates this section shall forthwith be removed from his office."

Sec. 453 of the Rev. Stat. of the U. S. provides: "The commissioner of the general land office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of public lands of the United States, or in any wise representing such public lands, and also such as relates to private claims of land and the issuing of patents for all agents of land, under the authority of the government."

The public land act giving the mode of procedure and the duties of officers in connection with the public lands, including mineral lands, will be found in "Title 32" Rev. Stat. of the U. S., and beginning with Sec. 2207 and ending with Sec. 2490.

Section 2223 of said title: "Every surveyor general

shall engage a sufficient number of skillful surveyors, as his deputies, to whom he is authorized to administer the necessary oaths upon their appointment. He shall order and frame regulations for their direction not inconsistent with law or the instructions of the general land office, and to remove them for negligence or misconduct in office."

Section 2334: "The Surveyor General of the United States may appoint in each land district containing mineral land as many competent surveyors as shall apply for appointment to survey mining claims."

Section 2478: "The commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations, every part of the provisions of this title, not otherwise specially provided for."

Said sections show the complete supervision which the Secretary of the Interior and Commissioner of the General Land Office have over the surveyors of the public domain.

The Secretary of the Interior, in passing upon said Section 452 in the case of Herbert McMicken et al., Vol. 10, L. D., page 97, decided on the 3d day of February, 1890, holds:

"This is a generalization or enlargement of Section 14 of the act of 1836, which was regarded as superseding the act of 1812. (Note on Revised Statutes U. S., Gould and Tucker, p. 52.) By this enlargement the prohibition or disqualification is extended to all 'officers, clerks and employees in the General Land Office,' and is not limited to persons appointed or employed in an office created by the act of 1812, or to officers whose salaries are provided for by the act of 1836. Do the words 'General Land Office,' as used in Section 452 and quoted above, relate only

to the main or central office located at the seat of government, or were they intended by Congress to embrace also the local offices and offices of Surveyors-General, which may be termed the branches or arms of the central office, through which the Commissioner of the General Land Office discharges 'all executive duties devolved upon him by law appertaining to the surveying and sale of public lands?' (Rev. Stat. 453.) There are two leading subdivisions of the business of the General Land Office, namely, the surveying and the sale or disposal of the public lands. The former is conducted primarily through the offices of the Surveyors-General and the latter through the local land offices. The Commissioner of the General Land Office is required, through the clerk of surveys in his office, to 'direct and superintend the making of surveys, the returns thereof and all matters relating thereto which are done through the offices of the Surveyors-General' (Rev. Stat., Sec. 449), and 'under the direction of the Secretary of the Interior to perform all executive duties appertaining to the surveying of the public lands.' (Ib. 453.) The duties of the Commissioner as to surveys are, in the language of the statute, 'done through the offices of the Surveyors-General,' and these offices are branches and integral parts of the central office; and I am of the opinion, that Section 452 of the Revised Statutes, by the substitution of the general words used therein for the special prohibition contained in prior legislation on the subject was intended to extend the disqualification to acquire public lands to officers, clerks and employees in any of the branches or arms of the public service under the control and supervision of the Commissioner in the discharge of his duties relating to the survey and sale of the public lands. Moreover, in construing a statute, it

> is proper to take into consideration the mischief it was passed to obviate. (Sedg. Stat. Com. Law 202.) The object of Section 452 was evidently to remove from the persons designated the temptation and the power by virtue of the opportunities afforded them by their employment, to perpetrate frauds and obtain an undue advantage in securing public lands over the general public, by means of their earlier and readier access to the records relating to the disposal of, and containing valuable information as to such lands. Officers, clerks and employees in the offices of the Surveyors-General fall clearly within the mischief contemplated by the statute and the reason of the law applies to them with equally as much force as to those in the central office at Washington. Statutes and regulations of this kind are based upon grounds of sound public policy and their strict enforcement is essential to the good of the public service."

This court recognizes that the land department of the Government absolutely controls all matters pertaining to the disposition of public lands of the United States. Congress has seen fit to legislate both particularly and generally upon this subject, and has committed to the Commissioner of the General Land Office ample power over the machinery by which the public lands are controlled, including that part thereof which pertains to the survey of the same. It has created subordinates known as Surveyors-General in the different land districts of the United States and by rules and regulations of the Secretary of the Interior passed and adopted in accordance with law, it has from an early date recognized certain deputies of the Surveyors-General, some of whom are known as Deputy United States Mineral Surveyors. These deputies are, as to many of their functions, mere employees of persons wishing to purchase lands from the United States; as to many other important functions, they are subject to the jurisdiction and control of the Sur-

veyors-General, and as such are officers, agents and servants of the United States who come within the purview of Sec. 452, above noted.

This court will take judicial notice of the public official acts of the executive departments of the United States, and among other official acts of the General Land Office will recognize and take notice of its rules and regulations. We call attention to a few extracts from the latest issue of the regulations issued by the Commissioner of the General Land Office and the Secretary of the Interior, approved July 26th, 1901. These are merely a revision of those which have preceded them and which were in force long prior to January 1, 1898. Certain of the sections which seem pertinent to the matter here under discussion are as follows:

Sec. 115: "Under Section 2334, U. S. Rev. Stats., the United States Surveyor General 'may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims.'"

Sec. 117: All appointments of deputy mineral surveyors must be submitted to the Commissioner of the General Land Office for approval.

Sec. 118: The Surveyors-General have authority to suspend or revoke the commission of deputy mineral surveyors for cause.

Sec. 120: The department has authority to investigate charges affecting the official acts of deputy mineral surveyors and will on sufficient cause shown, suspend or revoke their appointment.

Sec. 126: No return by a mineral surveyor will be recognized as official unless it is over his signature as a U. S. deputy mineral surveyor and made in pursuance of a special order from the Surveyor General's office. After he has received an order for survey, he is required to make a survey and return correct field notes thereof to the Surveyor General's office without delay.

Sec. 128: A mineral surveyor is precluded from act-

ing directly or indirectly as attorney in mining claims. His duty in any particular case ceases when he has executed the survey and returned the field notes and preliminary plat with his report to the Surveyor General * * * he will make no survey of a mineral claim in which he holds an interest, nor will he employ chainmen interested therein in any manner.

Sec. 156: In the Mineral Surveyor's certificate of the value of the improvements all actual expenditures and mining improvements made by the claimant or his grantors, having a direct relation to the development of the claim must be included in the estimate.

Sec. 157: The expenditures required may be made from the surface or in running a tunnel, drifts or cross-cuts for the development of the claim. Improvements of any character, such as buildings, machinery or roadways, must be excluded from the estimate, unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of, and actually facilitate the extraction of mineral from, the claim.

Sec. 160: If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey, the mineral surveyor may file with the Surveyor General supplemental proof showing five hundred dollars expenditure made prior to the expiration of the period of publication.

Sec. 167: Mineral surveyors are required to make full examination of all placer claims at the time of survey, and file with the field notes a descriptive report in which will be described (very many different matters pertaining to the quality and composition of the soil, the timber, vegetation, streams, underground workings, proximity of residences and towns, proximity of lode deposits, adaptability of claim for placer, etc., etc.)

> Sec. 169: The field work must be accurately and properly performed and returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at the surveyor's own expense, and if the time required in the examination of the returns is increased by reason of neglect or carelessness, he will be required to make an additional deposit for office work. He will be held to a strict accountability for the faithful discharge of his duties and will be required to observe fully the requirements and regulations in force as to making mineral surveys. If found incompetent as a surveyor, careless in the discharge of his duties, or guilty of a violation of said regulations, his appointment will be promptly revoked.

This court will take judicial notice of the fact that these deputy mineral surveyors are treated and relied upon by the surveyor general of the district for which they are appointed as the working field force of the office. They are required by Section 90 of the Rules and Regulations above mentioned, to enter into such bond, for the faithful performance of their duties, as may be prescribed by the regulations of the land department in force at that time. We understand that the amount of bond now required is ten thousand dollars.

To every office or appointment or employment under the United States in any of its departments of government there are attached certain duties and qualifications peculiar to the particular office, agency or employment. In addition thereto, there are certain limitations growing out of the employment or official relation. No one is obliged to enter into an office or accept from the United States any employment, trust or agency, but once accepted these limitations are binding. For instance, appellant will himself admit that by the express terms of Section 452 a Surveyor General may not locate a mining claim. This statutory provision is reasonable and based on principle of sound public policy, and so long as it ex-

ists, every Surveyor General must recognize its binding force. So also, the department by its rulings and regulations has placed upon its subordinates, to-wit, the deputy U. S. mineral surveyors, certain limitations in respect to the entering of public lands.

It has ruled, and that rule stands as the final and well considered action of the department, that no deputy mineral surveyor is allowed to make a mining location. Mr. J. Fewson Smith, Jr., at the time when he attempted to locate the "Yes You Do" lode mining claim, January 1st, 1898, was a deputy U. S. mineral surveyor. He was subject not only to the express provisions of the Revised Statutes of the United States, as all others are, but subject as well to the rules and regulations of the Commissioner of the General Land Office, and the Secretary of the Interior, with which department he had entered into official relations. He was charged with a knowledge of these regulations and was forbidden by the terms of his official relations, whether he be regarded as an agent, officer, or employee, a clerk, or what not, to locate land under the mining acts of the United States.

This was not a regulation impairing any common right which he had, for the reason that the right to locate lands is entirely statutory, and by the terms of R. S., Section 2319, which gives the only rights in respect to these lands which any person enjoys, it is expressly provided that

> "All valuable mineral deposits in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase and the lands in which they are found to purchase by citizens of the United States * * * *under regulations prescribed by law* * * * so far as the same are applicable and not inconsistent with the laws of the United States."

The land department has had occasion to rule directly on the question of the rights of a deputy U. S. mineral surveyor under Section 452 of the Revised Statutes, in the case of Floyd et al., vs. Montgomery et al., in the 26 L. D., pp.122-136, where the secretary holds as follows:

"In Herbert McMicken et al. (10 L. D., 97, on review 11 L. D., 96), Secretary Noble held that an officer, clerk or employee in the office of a United States Surveyor General is an officer, clerk or employee in the General Land Office within the meaning of this section; in Muller v. Coleman (18 L. D. 394), Secretary Smith held that a deputy surveyor is such an employee, and in the Neill case (24 L. D. 393), the present secretary held that a surveyor general is within the inhibition, so declared. A circular of similar import was issued September 15, 1890. (11 L. D. 348.) From an examination of these authorities and a consideration of the language and manifest purpose of the section, it seems clear that its prohibitive provisions embrace a deputy mineral surveyor. In so far as the case of State of Nebraska vs. Dorrington (2 C. L. L., 647); Dennison and Willits (11 C. L. O. 261) and Lock Lode (6 L. D. 105), are in conflict with the views expressed in these later cases they are overruled."

We desire to call attention of the court to the ex parte matter of the Lock Lode claim, heretofore referred to. The acting secretary held, "it is true, the deputy surveyor is in one sense an officer of the United States in the mining district for which he is appointed. The decision, however, is confined more particularly to the right of claimant as a deputy U. S. mineral surveyor to make the *survey* for his claim; the acting secretary holding that as the claimant did not make the survey and acted in no way except that of a claimant the entry could be allowed. The acting secretary, however, did not construe, nor call attention to said Section 452, and apparently was not aware of the same.

Secretary Hitchcock in the case of Frank A. Maxwell, in 29th L. D., page 76, also holds that said section includes deputy mineral surveyors, and that they are prohibited from making a mineral entry.

Mr. Lindley, in his work on Mines, Sec. 662, in speak-

ing of the powers and duties of the Commissioner of the General Land Office, says:

> "His duty is to perform, under the direction of the Secretary of the Interior, all executive acts appertaining to the surveying and sale of the public lands and also such as relate to private claims for lands, and the issuing of patents for all grants of land under the authority of the government.
>
> He is clothed with liberal powers of control, to be exercised for the purpose of justice and to prevent the consequences of inadvertance, irregularity, mistake or fraud in the important and extensive operations of that office for the disposal of the public domain.
>
> This general power of superintendence gives the commissioner of the general land office direct supervision over registers and receivers whose decisions on all questions he is authorized to review.
>
> Under the direction of the Secretary of the Interior, the commissioner is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of the Federal laws, regulating the sale and disposal of the public lands not otherwise specially provided for.
>
> These regulations, when not repugnant to the Acts of Congress, have the force and effect of laws, and courts take judicial notice of them."

Again, in Section 664, in speaking of the jurisdiction of the land department, he says:

> "With the exercise of its discretionary powers the courts cannot interfere and within certain recognized limits, its judgments are final."

It will be sufficient upon this question to quote the Supreme Court of the United States:

> "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs

exclusively to the political department of the government, and that the action of that department within the scope of its authority is unassailable in the courts except by a direct proceeding."

Knight v. U. S. Land Association, 142 U. S. 161, cited and approved in Gardner v. Bonestell, 180 U. S. 369.

This is a well recognized principle and many authorities might be added. See

Cragin v. Powell, 128 U. S. 591;
Bishop of Nesqually v. Gibbon, 158 U. S. 155.

It certainly cannot be contended that in exercising this important power of correctly and impartially surveying the lands of the United States the Land Department has not the absolute control over the officers or agents through which it acts. Even if Section 452 had never been enacted by Congress the Secretary of the Interior might very properly have formulated a rule forbidding deputy United States mineral surveyors from locating mining claims. The considerations of policy which would support such a rule are fully set forth in the decisions of the land department, above noted.

Even if it should be regarded as a matter into which this court or any court of law might inquire, the practical construction given by the land department to the provisions of Section 452 would be regarded as most persuasive, and certainly be followed.

Hastings etc. Co. vs. Whitney, 132 U. S. 357.

In this case the court says:

"It is true that the decisions of the land department on matters of law are not binding upon this court in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In United States v. Moore, 95 U. S. 760, this court said: The construction given to a statute by those

charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret. See also Brown vs. United States, 113 U. S. 568, and cases there cited; U. S. vs. Burlington & U. R. R. Co., 98 U. S. 341; Kansas Pac. Ry. Co. vs. Atchison, T. & S. F. R. R., 112 U. S. 418."

II.

The plaintiff in error consumes much space in the discussion of the alleged Levi P. and Veta mining claims. We cannot see the materiality of the argument, as the petition for a writ of error nowhere mentions these claims, and the assignments of error do not question the correctness of the rulings of the court on this matter.

The defendants applied for a patent for the Uhlig No. 1 and Uhlig No. 2 lode mining claims, described as follows:

> Commencing at corner No. 1 of said Uhlig No. 1 claim and running north 20 degrees 12 minutes, west 145.5 feet to corner No. 4 of said Uhlig No. 2 claim; thence north 50 degrees 38 minutes, east 1,437.8 feet to corner No. 1 of said Uhlig No. 2 claim; thence south 20 degrees 12 minutes, east 600 feet to corner No. 2 of Uhlig No. 2 claim; thence south 50 degrees 38 minutes, west 1,437.8 feet to corner No. 3 of said Uhlig No. 2 claim; thence south 20 degrees 12 minutes, east 145.5 feet to corner No. 2 of said Uhlig No. 1 claim; thence south 76 degrees 36 minutes, west 1,151.9 feet to corner No. 3 of said Uhlig No. 1 claim; thence north 20 degrees 12 minutes, west 522.9 feet to corner No. 4 of said Uhlig No. 1 claim; thence north 72 degrees 46 minutes, east 1,145.3 feet to corner No. 1 of said Uhlig No. 1 claim, to the place of beginning.

The only adverse proceeding in the land office and before the court, to said application, is for the alleged conflict area between the Yes You Do and the Uhlig No. 1 and Uhlig No. 2, brought by the plaintiff against the defendants, said alleged conflict area is described in plaintiff's complaint as follows:

Conflict area with the Uhlig No. 2 lode:

Beginning at a point on the northerly side line of said Uhlig No. 2 lode mining claim 1,177.6 feet distant from corner No. 1 of said claim, south 50 degrees 38 minutes west from said corner No. 1, running thence south 35 degrees 30 minutes, east 227.4 feet; thence south 54 degrees 30 minutes, west 317 feet; thence north 20 degrees 12 minutes, west 217.6 feet, to corner No. 4 of said Uhlig No. 2; thence north 50 degrees 38 minutes, east 260.2 feet to the place of beginning, an area of 1.441 acres.

Conflict area with said Uhlig No. 1 lode mining claim is described as follows:

Beginning at a point on the westerly end line of the Uhlig No. 2 lode mining claim, 217.6 feet from corner No. 4 of said Uhlig No. 2, running thence south 54 degrees 30 minutes, west 1083 feet; thence north 35 degrees 30 minutes, west 376.1 feet; thence north 20 degrees 12 minutes, west 54.3 feet; thence south 72 degrees 46 minutes, east 1145.3 feet; thence south 20 degrees 12 minutes, east 72.1 feet to the place of begining.

Plats and maps were introduced in evidence as exhibits in the district court, but the plaintiff has not seen fit to make them a part of the record.

For the purpose of showing the relative positions of the Uhlig No. 1 and Uhlig No. 2 with the alleged area in conflict with the Yes You Do, we submit the following plat showing the metes and bounds of said locations, the location of the discoveries together with the alleged area in conflict according to the allegations of the

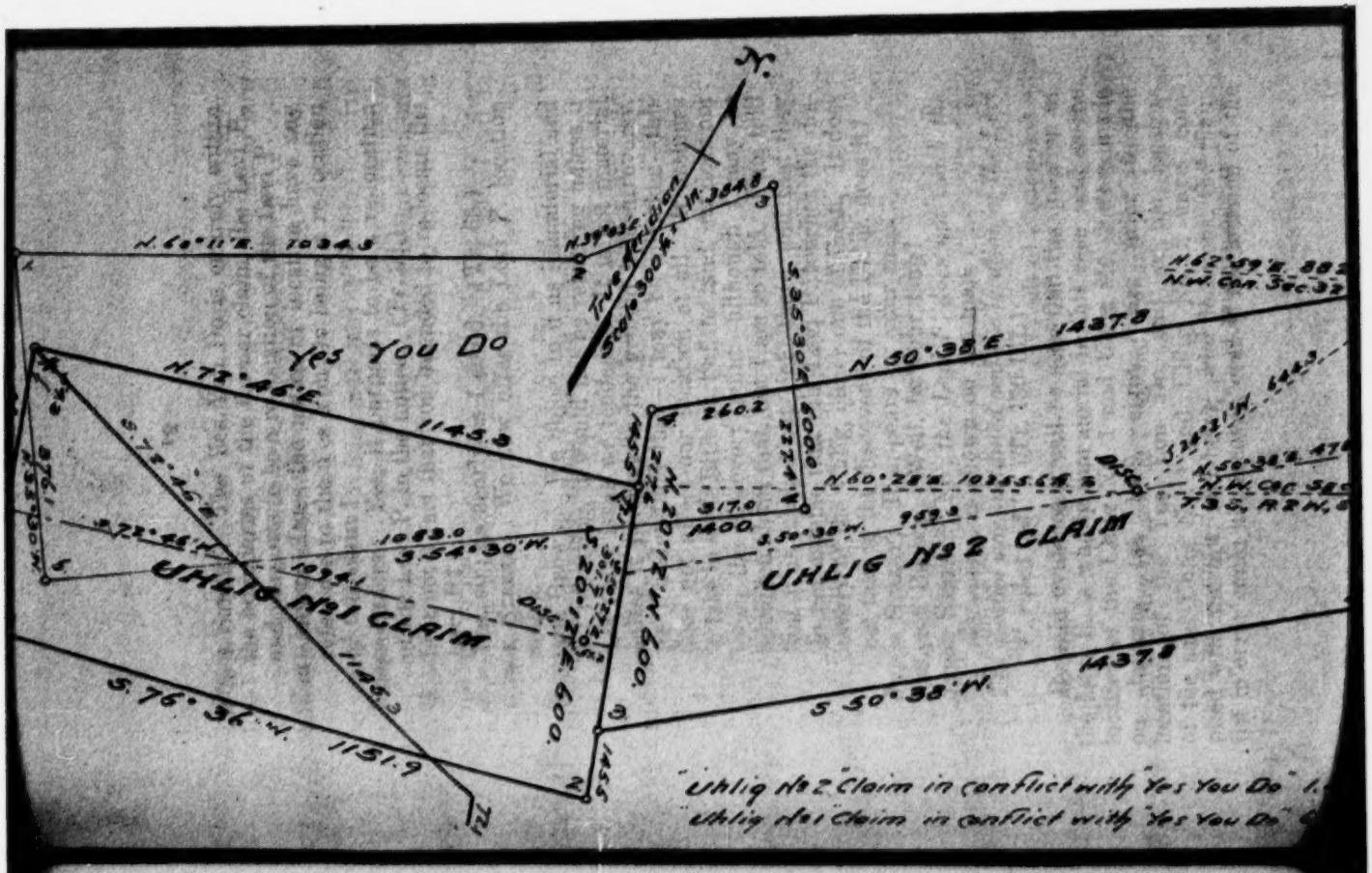
complaint and answer and the testimony adduced at the trial in the District Court. As the adverse in the Land Office and the allegations of the complaint and answer are confined to the conflict area between the Yes You Do and the Uhlig No. 1 and Uhlig No. 2, the evidence must necessarily be confined to that issue, and the evidence can not be expanded to include mythical grievances of other parties who have failed to file adverse proceedings and who claim no interest in the property.

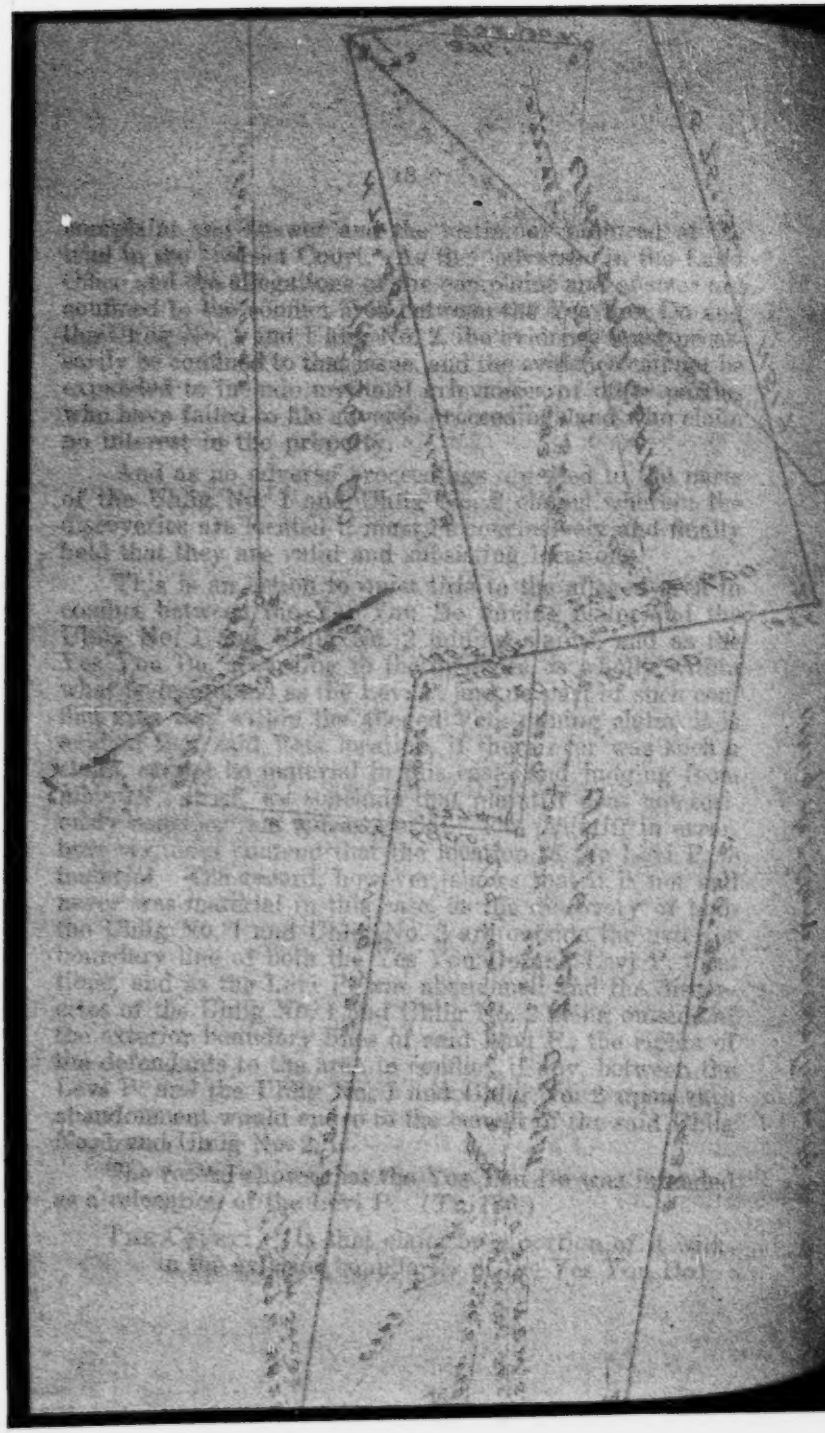
And as no adverse proceedings are filed to the parts of the Uhlig No. 1 and Uhlig No. 2 claims wherein the discoveries are located it must be conclusively and finally held that they are valid and subsisting locations.

This is an action to quiet title to the alleged area in conflict between the Yes You Do mining claim and the Uhlig No. 1 and Uhlig No. 2 mining claims, and as the Yes You Do, according to the evidence, is wholly within what is designated as the Levi P. and no part of such conflict area was within the alleged Veta mining claim, it is evident that said Veta location, if there ever was such a claim, cannot be material in this case; and judging from plaintiff's brief, we conclude that plaintiff does not seriously consider that it is material. The plaintiff in error, however, does contend that the location of the Levi P. is material. The record, however, shows that it is not and never was material in this case, as the discovery of both the Uhlig No. 1 and Uhlig No. 2 are outside the exterior boundary line of both the Yes You Do and Levi P. locations, and as the Levi P. was abandoned and the discoveries of the Uhlig No. 1 and Uhlig No. 2 being outside of the exterior boundary lines of said Levi P., the rights of the defendants to the area in conflict, if any, between the Levi P. and the Uhlig No. 1 and Uhlig No. 2 upon such abandonment would enure to the benefit of the said Uhlig No. 1 and Uhlig No. 2.

The record shows that the Yes You Do was intended as a relocation of the Levi P. (Tr. 136.)

THE COURT: "Is that claim or a portion of it within the exterior boundaries of the Yes You Do?


N.
True Meridian
Scale 300 ft. = 1 in.
N. 60° 11' E. 1034.3
N 39° 03' E. 384.8
S. 35° 30' E. 600.0
N 62° 59' E. 88.2
N.W. Cor. Sec. 32
Yes You Do
N. 77° 46' E.
1145.3
N. 50° 38' E. 1437.8
260.2
1274
N 60° 28' W. 1035.6 ft.
Disc.
N. 50° 38' E. 471
N.W. Cor. Sec.
T. 3 S., R. 2 W.
S. 77° 46' E.
1145.3
N. 39° 03' W. 1978
S. 77° 46' E.
1088.0
S. 54° 30' W.
1034.1
317.0
1400.
S. 50° 38' W. 959.3
UHLIG No 2 CLAIM
UHLIG No 1 CLAIM
Disc.
N. 20° 02' E. 600.
N. 71° 02' W. 600.
S. 76° 36' W. 1151.9
1145.3
S 50° 38' W. 1437.8
"Uhlig No 2" Claim in conflict with "Yes You Do"
"Uhlig No 1 Claim in conflict with "Yes You Do"



JUDGE STREET: The Yes You Do is entirely within the boundaries of the former claim, the Levi P., and purports to be a re-location of the Levi P.

THE COURT: Does the notice of location have any reference to the Yes You Do being a re-location of this claim?

JUDGE STREET: Yes, it purports to be a re-location of the Levi P. in the notice. (Tr. 52.)

Q.—Is it not a fact that you intended to re-locate the Levi P?

A.—Yes, sir; as nearly as I could. (Tr. 65.)

JUDGE STREET: We now offer the Levi P. location notice.

SENATOR BROWN: We object to it as immaterial and not rebutting, it would not be rebutting unless it met some issue we tendered. It is not material unless it pertains to the ground in controversy. As I understand this—I may be mistaken—this does not affect our location at all. It assumes to take in some little part of the land, but does not touch the discovery point—although I may be mistaken about that, but I am so told. I am told that it is marked out right there, and that they do not assume that this Levi P. touches the discovery of the Uhlig, either one of them. It does not take in the discovery of the Uhlig, does it?

JUDGE STREET: It appears by your map.

SENATOR BROWN: Well, by your map?

JUDGE STREET: No; *the Levi P. does not touch the discovery,* as shown on the map.

The motion was sustained and the location of the Levi P. ruled out." (Tr. 130-131.)

By said evidence it will be seen that the question of the Levi P. is wholly immaterial in this case, and as the location of the Uhlig No. 1 and Uhlig No. 2 were made on January 1st, 1889, eight years prior to the location of the Yes You Do, and as the locators of the said Uhlig No. 1 and Uhlig No. 2 have complied with the law, and being prior locations, the plaintiff in error could not recover, even if the location of the

Yes You Do had not been made by a deputy United States mineral surveyor, for the reason that said Yes You Do was the junior location, as shown by the record.

The ghosts of dead and abandoned locations, without adverse proceedings, can not be resurrected for the purpose of defeating the rights of citizens who in good faith are developing the mineral resources of the United States, and applying for patents to mining claims.

Section 2326 Rev. Stat. U. S., among other things provides:

> "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; *and a failure so to do shall be a waiver of his adverse claim.*"

When the plaintiff in this case attempted to introduce evidence tending to show that not he, but Mayberry, held this mineral ground by a valid location in 1889, when the Uhlig claims were located, he was met by the absolute and positive provision of the statute, to the effect that Mr. Mayberry and any and every person whomsoever, excepting the plaintiff in this case, had waived all rights to the ground in controversy, and further by an assumption or presumption absolutely binding and conclusive upon the courts, that whatever claim Mr. Mayberry had in the land was inferior to the rights of the defendant to patent the ground.

The Supreme Court of the State of Utah in passing upon this question, refer to the sections of the Revised Statutes of the United States, and quote authorities, and say:

> "We think it is clear, both from the language of the sections of the Revised Statutes referred to and the authorities cited, that it must, as stated by Mr. Justice Brewer, be conclusively presumed that Andrew P. Mayberry, as he failed to make any

adverse claim, had none, and as the plaintiff failed to show any right to the disputed premises, he became a stranger to the title, and thereafter had no more right than any other stranger to further contest the defendant's claim. While Mayberry has the right, like any stranger, to protest, he cannot do so on the basis of any rights he may have had in either the Levi P. or Veta mining claims. It follows that he conclusively waived his right to do so by failing to file an adverse claim, and the plaintiff in this case and all other strangers to the title are likewise precluded from protesting on like grounds." (Tr. 147.)

The defendants therefore respectfully submit that the decision of the Supreme Court of Utah should be affirmed.

Respectfully submitted,
ARTHUR BROWN,
D. H. WENGER,
Attorneys for Defendants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND SAINT JOE MINING COMPANY.

Supplemental Statement of Facts to Defendants' Brief.

It is not admitted by the defendants that the Levi P. and Veta mining claims were located prior to the Uhlig No. 1 and Uhlig No. 2 mining claims. The record shows that all of said claims were located on the same day.

Mr. MAYBERRY, the locator of the Levi P. mining claim, was interrogated:

Q. Will you please explain this Plaintiff's Exhibit No. 2 and indicate where the discovery of the Levi P. claim was?

A. I do not know about that map. There is nothing on there that would indicate where the discovery was. There was a bluff; if that was on the map, I could tell.

Q. There is nothing there to indicate the location of the Levi P.?

A. Not on the map (Tr., 117).

Q. Have you examined the map to see whether that is correct so far as the Levi P. is concerned?

A. I could not say whether that is correct or not.

Q. Do you say "yes" or "no"?

A. I can't say whether it is correct or not (Tr., 128).

Mr. J. FUSON SMITH, JR., deputy U. S. mineral surveyor, who made the location of the Yes-You-Do, was interrogated as follows:

Q. Did you know at the time you located this ground of a claim called the Levi P.? Had you examined as to the location of that claim?

A. Why——

Q. (Continuing:) I mean where it was located on the ground.

A. I had inquired (Tr., 52).

Q. Where did you get your data to plat the Levi P. location and Veta location?

A. From information furnished by Mr. Mayberry, the location notice, and points on the ground. *I won't say corners* (Tr., 57).

What can this court, or any court, know about a conflict area if it is not platted by metes and bounds, and how could the conflict area be shown without reference to the corners of the claims; and if the locator, who should be familiar with his own claim, can find no conflict, how can a stranger, without knowing where the corners are located, be able to show there is a conflict? We will go still farther with the record. The location notice of the Yes-You-Do is described as commencing at the *southeast* corner of the No-You-Don't mining claim; thence northeasterly 1,500 feet to

the common corner of the No-You-Don't and the Yes-You-Do; thence southeasterly 600 feet; thence southwesterly 600 feet; thence northwesterly 600 feet to the place of beginning.

Location notice, Tr., 136.

MAYBERRY testifies:

I started at the *southwest* corner of the No-You-Don't; made that a common corner for the Levi P.; it would be the northwesterly corner of the Levi P. and the southwest corner of the No-You-Don't; thence southerly 300 feet, more southerly than easterly, to common corner of the Levi P. and Veta. Next corner was a Veta corner 300 feet down the hill, 600 feet down the hill from the common corner; next, southeasterly corner of the Levi P. and northeasterly of the Veta 1,700 feet (Tr., 118, 119).

So that according to the record there was no conflict and could be no conflict between the Levi P. and Veta on the one hand and the Uhlig No. 1 and Uhlig No. 2 on the other, and this according to plaintiff's testimony. The offers made by plaintiff contradict the testimony of his own witnesses.

The defendants made no objections to the plaintiff proving the locations of the Levi P. and Veta to be valid locations, provided it was shown that they were in conflict with Uhlig No. 1 and Uhlig No. 2. The defendants objected to the notice of location of the Levi P. upon the ground that it did not show that said locations were in conflict with the defendants' claims.

Mr. Sonnedecker and Mr. Howat, who drew and signed the petition for the writ of error, were familiar with the facts and the record, and made no claims on account of the Levi P. and Veta locations, and they undoubtedly were familiar with the exhibits which the plaintiff in error did not see fit to make a part of the record in the supreme court of Utah nor in this court, and, being so familiar, made no objections to the rulings of the court on the matter of the

Levi P. and Veta, and as the petition for writ of error fails to mention this matter and no assignments or error are claimed in connection therewith, and the evidence fails to show any conflict area with the Uhlig No. 1 and Uhlig No. 2, it should, therefore, have no place in this hearing.

Respectfully submitted.

D. H. WENGER,
ARTHUR BROWN,
Attorneys for Defendants.

D H Wenger
Arthur Brown
Attys for Defts

Supreme Court of the United States.

No. 120.—October Term, 1904.

Giovanni Lavagnino, Plaintiff in Error,
vs.
Edmund H. Uhlig, Alexander McKernan and The St. Joe Mining Company.

In error to the Supreme Court of the State of Utah.

[May 29, 1905.]

Uhlig and McKernan, two of the defendants in error, by locations alleged to have been made on January 1, 1889, asserted ownership of two adjacent mining lode claims, designated respectively as the Uhlig No. 1 and the Uhlig No. 2, situated in the West Mountain mining district, in Salt Lake County, State of Utah. In the month of August, 1898, the parties named filed in the proper land office an application for patent for said claims, During the publication of notice of the filing of the application, Giovanni Lavagnino, plaintiff in error—as the alleged owner of a mining lode claim called the Yes You Do—filed an adverse claim to a portion of the land embraced in each of the Uhlig locations, which it was asserted overlapped the Yes You Do. Thereupon, pursuant to the requirements of section 2326 of the Revised Statutes, this action was brought in a District Court of Salt Lake County, Utah, to determine in whom was vested the title and right of possession to the conflicting areas, which in the case of the Uhlig No. 1 claim amounted to 6.374 acres and in the No. 2 to 1.441 acres.

In substance, Lavagnino alleged in his complaint that at the time of the location of the Uhlig claims there was a subsisting valid location known as the Levi P. lode claim, which included within its areas the land in dispute in the action; that the necessary labor required by the statutes of the United States was performed upon the claim up to and including the year 1896; that no actual labor or improvements were made upon the claim for the year 1897, and in consequence all the land included within the Levi P. location became forfeited and acquired the status of unoccupied and mineral lands of the United States, and that while such was the status of the land, on January 1, 1898, one J. Fewson Smith, Jr.—the grantor of Lavagnino—relocated the Levi P. claim as the Yes You Do, and that thereafter all the requirements necessary to be done had been performed, and the Yes You Do was then a valid and subsisting location.

Subsequently the St. Joe Mining Company was substituted in the stead of Uhlig, as a party defendant.

On the trial it was shown that at the time Smith located the Yes You Do claim he was a deputy mineral surveyor for the district in which such mining claim was situated, and that he made the survey and plat for the protest which had been filed in the land office against the Uhlig application for patent. On the offer, as evidence for the plaintiff, of the notice of location of the Yes You Do claim and the deed from Smith to Lavagnino, objection was made to their admission and the offered evidence was excluded upon the ground that the asserted location by Smith of the Yes You Do was not valid, because at the time of the making thereof Smith was a deputy mineral surveyor, and was prohibited by the terms of section 452 of the Revised Statutes of the United States from making the location of a mining lode claim. For the same reason the trial court sustained an objection to evidence offered on behalf of the plaintiff tending to show that at the time the Uhlig claims were located the ground covered by such locations was then covered by prior locations made at an earlier hour on the same day, and was consequently not subject to location as unoccupied mineral lands of the United States. That one of said locations—the Levi P.—embraced the premises in dispute, and was a subsisting location until forfeited by failure to perform the annual work for the year 1897; that the relocation of said claim as the Yes You Do was made on January 1, 1898; and that the annual work and other steps required by law to be done in connection with the claim had been performed.

Following the introduction of testimony tending to show the validity of the Uhlig locations, testimony was introduced on behalf of the plaintiff in respect to the location and working of the Levi P. claim, but on the offer of the Levi P. location notice the trial court sustained an objection thereto, and ruled that as the Yes You Do was not a valid location there were no adverse claims before the court, and as a result it was to be conclusively presumed that there did not exist any location which in anywise conflicted with the Uhlig claims sought to be patented.

The court made findings of fact, in which, *inter alia*, it was recited that the plaintiff at the trial had not introduced any legal or competent evidence to sustain the issues on his part, and consequently that "upon the trial, on motion of counsel for defendants, the said action of the plaintiff against the defendant was, and is hereby, dismissed." The facts were then found in respect to the location and working of the Uhlig claims, and, as conclusions of law, the court held that the action against the defendants should be dismissed with costs, and that the defendant, the St. Joe Mining Company, and the defendant, Alexander McKernan, were entitled to purchase from the United States of America the said Uhlig claims and the whole thereof, and were also entitled to a decree quieting their title to the premises in dispute. From a decree entered in con-

formity to these conclusions an appeal was prosecuted to the Supreme Court of Utah, and that court affirmed the decree. (26 Utah, 1.) A writ of error was thereupon sued out from this court.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The Supreme Court of Utah was of the opinion that, by force of section 452 of the Revised Statutes of the United States, (copied in the margin,*) J. Fewson Smith, Jr., being a deputy mineral surveyor, was disqualified from locating the Yes You Do claim; that in consequence the attempted location of such claim was void; and that the plaintiff Lavagnino acquired no rights by the conveyance of the claim to him by Smith. It was next decided that, as the plaintiff had failed to show any right to the disputed premises, he became a stranger to the title, and was without right to contest the claim of the defendant. The correctness of the decree entered by the trial court was also held to result from the terms of section 2332 of the Revised Statutes of the United States, and section 2859 of the Revised Statutes of Utah, both of which sections are copied in the margin.†

Adopting the finding of the trial court that the Uhlig claims were valid locations, attention was called to the fact that those claims were located on January 1, 1889, while the Yes You Do was located more than eight years thereafter, viz., on January 1, 1898. A mining claim was declared to be a possessory right and real estate under the statutes of Utah, and it

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*Section 452 Revised Statutes of the United States.

"The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

†Section 2332, Rev. Stat. United States.

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property attached prior to the issuance of a patent."

Section 2859, Rev. Stat. Utah.

"No action for the recovery of real property, or for the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor was seized or possessed of the property in question within seven years before the commencement of the action."

was held that one Mayberry, the locator of the Levi P. claim, not having instituted a suit to recover possession of the premises in dispute within seven years after the location of the Uhlig claims, was barred of all right to such premises by the terms of section 2859 of the Revised Statutes of Utah, and that his right to contest the title of the defendants to the conflict areas "was also waived by his failure to adverse the application for a patent of the Uhlig Nos. 1 and 2." The court added: "In view of these facts the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy United States mineral surveyor, as the location of the 'Yes You Do' was not made until eight years after the possession of the Uhlig Nos. 1 and 2 was begun, could not avail himself of any rights which the said Mayberry may have had."

This latter ruling of the Supreme Court of Utah forms the basis for the first of two grounds of a motion to dismiss this writ of error, which motion will now be passed upon.

The first is, in substance, that, assuming that there was a Federal question determined by the Supreme Court of Utah, its decision was not necessary, and whether it was or not jurisdiction does not exist, because there was another ground upon which the decree of the trial court was affirmed, non-Federal in its nature, and broad enough to maintain the judgment, viz., the ruling of the bar of the statute of limitations. The second ground is thus stated:

"That under the decision of the Supreme Court of the State of Utah, this court has no jurisdiction to hear and determine the question raised under section 452, Rev. Stat. U. S., for the reason that the plaintiff in error has not brought himself within the provisions of section 709, Rev. Stat. U. S."

We are of opinion that neither of the grounds urged in support of the motion to dismiss are tenable. As to the first, it is true that the Supreme Court of Utah decided that, even although J. Fewson Smith, Jr., had been qualified to locate the Yes You Do claim, the location was invalid because made more than seven years after the location of the Uhlig Nos. 1 and 2, when, it was held, the bar of the statute of limitations was operative. But this amounted to saying that even although the plaintiff was entitled to adverse the Uhlig claims, he could not be heard to rebut the evidence for the defendants as to the possession under the Uhlig locations, by evidence as to the possession taken and had under the Levi P. location. Plainly we think the ruling denied to the grantee of the Yes You Do, under the hypothesis that they existed, rights asserted by him under section 2324 of the Revised Statutes authorizing the relocation of forfeited claims. It is evident from the record that the finding of the trial court as to the time when possession was taken of the Uhlig Nos. 1 and 2 claims, and the duration of possession was based entirely upon the evidence

introduced on behalf of the owners of those claims. The trial court treated as irrelevant and immaterial evidence tending to show that the premises in dispute were embraced in the Levi P. location, and that possession of that claim was held and retained from a time at least contemporaneous with the initiation of the Uhlig locations and almost up to the location of the Yes You Do, as a relocation of the Levi P. Under such circumstances a decision that the bar of the seven years' statute of limitations was operative, upon the assumption that the locator of the Yes You Do was entitled to adverse conflicting locations, amounted to deciding that Lavagnino could not show that the premises in dispute were unoccupied mineral lands of the United States at the time of the location of the Yes You Do, and, as bearing upon the validity of the relocation of the Levi P., the facts as to the location, possession under, and forfeiture of the Levi P. claim. The necessary effect of this ruling, as before stated, was, we think, to deny to the locator of the Yes You Do the protection of the relocation provisions of section 2324 of the Revised Statutes, if that section justified the claim of right based upon it.

As to the second ground, the record clearly shows that the trial court considered that the plaintiff was specially claiming rights under section 2326 of the Revised Statutes, authorizing an adverse of an application for a patent to mineral lands, and the Supreme Court of Utah necessarily acted upon that assumption in the opinion by it delivered. The motion to dismiss is, therefore, overruled.

The question then is, Did the Supreme Court of Utah err in affirming the decree of the trial court?

As we have seen, the Supreme Court of Utah, in part, rested its conclusion, upon the want of power in a deputy mineral surveyor to make the location in question, in consequence of the prohibition contained in section 452 of the Revised Statutes. A consideration of that subject, however, will be unnecessary if it be found that even if a deputy mineral surveyor was not within the restriction of the section referred to, nevertheless, the rights asserted under the Yes You Do location in the adverse proceeding were not paramount to the rights arising from the Uhlig location. We, therefore, come at once to a consideration of that question, and, of course, in doing so assume, for argument sake, that the section of the Revised Statutes relied upon and the rules and regulations of the land department did not prohibit a deputy mineral surveyor from making a location of mineral land. And, moreover, in considering the question which we propose to examine, we concede, for the sake of argument, that the Levi P. location, of which the Yes You Do purported to be a relocation, was prior in date to the location of the Uhlig Nos. 1 and 2, and that there were areas in conflict between them. With all these concessions in mind the question yet remains whether Smith and his transferee, in virtue of the

location of the Yes You Do, stood in such a relation as to enable them, or either of them, to successfully adverse the application for patent made by the owners and possessors of the Uhlig locations.

It is undoubted that this court in a number of cases has declared that the rights of a subsisting senior locator of mineral land are paramount to those of the owner of a junior location, so far as said junior location conflicts in whole or in part with the prior location. (*Clipper Mining Co.* v. *Eli Min. & Land Co.*, 194 U. S. 220, 226, and cases cited.) It is elementary also that the power conferred by section 2324 of the Revised Statutes, to relocate a forfeited mining claim, does not place the locator in privity of title with the owner of the prior and forfeited location. The statute merely provides that when a forfeiture has been occasioned "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

The question then is, where there was a conflict of boundaries between a senior and junior location, and the senior location has been forfeited, has the person who made the relocation of such forfeited claim the right, in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim?

To say that the relocator had such right involves, necessarily, deciding that, as to the area in conflict between the junior and the senior locations, the junior could acquire no present or eventual right whatever, and that on the abandonment or forfeiture of the senior claim the area in conflict became, without qualification, a part of the public domain. In other words, the proposition must come to this: that as the junior locator had acquired no right whatever, present or possible, by his prior location, as to the conflicting area, he would be obliged, in order to obtain a patent for such area, to initiate in respect thereto a new right, accompanied with a performance of those acts which the statute renders necessary to make a location of a mining claim.

The deductions just stated are essential to sustain the right of the relocator of a forfeited mining claim to contest a location existing at the time of the relocation, on the ground that such existing location embraced an area which was included in the forfeited and alleged senior location, for the following reasons: If the land in dispute between the two locations, which antedated the relocation, did not, on the forfeiture of the senior of the two locations, become unqualifiedly a part of the public domain, then the right of the junior of the two would be operative upon the area in conflict on a forfeiture of the senior location. If it had that effect it neces-

sarily was prior and paramount to the right acquired by a relocation of the forfeited claim.

But we do not think that the deductions which we have said are essential to sustain the right of the relocator to adverse, under the circumstances stated, can be sustained consistently with the legislation of Congress in relation to mining claims. Indeed, we think such a construction would abrogate the provisions of section 2326 of the Revised Statutes, which is as follows:

"SEC. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the proceeding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice and performed the other acts made necessary to entitle to a patent, and who makes application for the patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section. Thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for which a patent is sought, he may abandon such rights and cause them in effect to enure to

the benefit of the applicant for a patent by failure to adverse, or, after adversing, by failure to prosecute such adverse.

It cannot be denied that under section 2326, if before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adversed the application, upon an establishment of a *prima facie* right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. (*Gwillin* v. *Donnellan*, 115 U. S. 45, 51.) And the same result would have arisen had the owner of the Levi P. adversed the application for a patent based upon the Uhlig locations and failed to prosecute and waived such adverse claim.

In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete.

Of course, the effect of the construction, which we have thus given to section 2326 of the Revised Statutes, is to cause the provisions of that section to qualify sections 2319 and 2324, thereby preventing mineral lands of the United States, which have been the subject of conflicting locations, from becoming *quoad* the claims of third parties, unoccupied mineral lands, by the mere forfeiture of one of such locations.

In text books (Barringer and Adams, Law of Mines and Mining of the United States, p. 306; Lindley on Mines, 2d ed. pp. 650–1) statements are found which seemingly indicate that in the opinion of the writers, on the forfeiture of a senior mining location, *quoad* a junior and conflicting location, the area of conflict becomes in an unqualified sense unoccupied mineral lands of the United States without enuring in any way to the benefit of the junior location. But, in the treatises referred to, no account is taken of the effect of the express provisions of Rev. Stat. section 2326. Moreover, when the cases to which the text writers referred, as sustaining the statements made, are examined, it will be seen that they were decided either before the passage of the adverse claim statutes of 1872, or concerned controversies between the senior and junior locators or depended

upon the provisions of State statutes. How far such statutes would be controlling, we are not called upon to say, as it is not claimed that there is any statute in Utah in any way modifying the express provisions of section 2326.

As the issue raised by the complaint in this action concerned only the conflict areas and on the trial the invalidity of the Uhlig locations, in respect to the premises in dispute, was attempted to be established solely by proof that the Levi P. was an antecedent location and embraced the grounds in conflict, it follows, from the opinion which we have expressed, that at the time when Smith located the Yes You Do claim as a relocation of the Levi P. claim the land embraced within the location notices of the Uhlig claims, and upon which the Yes You Do overlapped, was not unoccupied mineral lands of the United States, and was consequently not subject to be relocated by Smith, even under the mere hypothesis which we have indulged in, that, as a deputy mineral surveyor, he was not debarred from making the location. For this reason the judgment of the Supreme Court of Utah was right, and it must therefore be

Affirmed.

Mr. Justice BREWER concurs in the result.

Mr. Justice MCKENNA dissents.

True copy.

Test:

Clerk Supreme Court, U. S.